88-1056

Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

# Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF PENNSYLVANIA,

*Petitioner,*

vs.

RICHARD WAGGONER,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, PHILADELPHIA DISTRICT

STUART B. SUSS, ESQUIRE
Deputy District Attorney
(Counsel of Record)

JAMES P. MACELREE, II, ESQUIRE
District Attorney, Chester County
17 North Church Street
Courthouse Annex - Second Floor
West Chester, PA 19380
(215) 431-6801
*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

90 pp

## QUESTIONS PRESENTED

1. ARE DEFENDANT'S UTTERANCES INCIDENT TO POLICE VIDEOTAPING OF HIM, FOLLOWING HIS ARREST FOR DRUNK DRIVING, TESTIMONIAL EVIDENCE WITHIN THE PURVIEW OF THE FIFTH AMENDMENT (AN ISSUE AS TO WHICH STATE COURTS ARE IN CONFLICT)?

2. IS INSTRUCTIONAL ADVICE INCIDENT TO POLICE VIDEOTAPING OF AN INDIVIDUAL ARRESTED FOR DRUNK DRIVING, 'INTERROGATION' WITHIN THE PURVIEW OF THE *MIRANDA* DOCTRINE?

3. DOES THE SIXTH AMENDMENT RIGHT TO COUNSEL ATTACH AT ARREST, PRIOR TO THE INITIATION OF ADVERSARY CRIMINAL PROCEEDINGS?

4. ASSUMING QUESTION 3 IS ANSWERED IN THE AFFIRMATIVE, IS THE AUDIOTAPING OF A DEFENDANT ARRESTED FOR DRUNK DRIVING A 'CRITICAL STAGE' ENTITLING DEFENDANT TO THE PRESENCE OF COUNSEL?

5. ASSUMING ANY OF THE FIRST THREE QUESTIONS IS ANSWERED IN THE AFFIRMATIVE, DID DEFENDANT'S DECLARATION OF HIS INABILITY TO AFFORD AN ATTORNEY CONSTITUTE AN ASSERTION OF EITHER HIS FIFTH OR SIXTH AMENDMENT RIGHT TO COUNSEL?

6. SHOULD THE PER SE RULES OF EITHER *MIRANDA V. ARIZONA* OR *EDWARDS V. ARIZONA* BAR THE ADMISSION INTO EVIDENCE OF AN AUDIO RECORDING OF DEFENDANT'S VOICE WHEN A VIDEOTAPE CLEARLY DEMONSTRATES THAT DEFENDANT'S UTTERANCES WERE NOT COERCED?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iv

PRAYER ..... 1

OPINIONS BELOW AND JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

REASON FOR GRANTING THE WRIT ..... 6

1. THE SUPERIOR COURT OF PENNSYLVANIA HAS REQUIRED A WAIVER OF RIGHTS PURSUANT TO *MIRANDA* AND THE PRESENCE OF COUNSEL BEFORE THE AUDIO PORTION OF A VIDEOTAPE OF AN ARRESTED DRUNK DRIVER MAY BE ADMITTED INTO EVIDENCE. THAT RULING, PREMISED UPON AT LEAST FIVE ERRONEOUS FEDERAL CONSTITUTIONAL CONCLUSIONS, HAS CREATED A CONFLICT WITH OTHER STATES AND HAS UNJUSTIFIABLY COMMANDED TRIAL COURTS TO EXCLUDE THE MOST PROBATIVE EVIDENCE OF A DEFENDANT'S INTOXICATION ..... 6

CONCLUSION ..... 23

APPENDICES

Appendix A: October 19, 1988 Order of the Supreme Court of Pennsylvania denying the Commonwealth's Petition for Allowance of Appeal ..... 1a

Appendix B: Judgment and Opinion of the Superior Court of Pennsylvania dated April 4, 1988 ..... 2a

TABLE OF CONTENTS–Continued

Page

Appendix C: Opinion of the Honorable Robert S. Gawthrop, III, of the Court of Common Pleas of Chester County, Pennsylvania dated June 9, 1987 ..... 22a

Appendix D: Findings of fact and conclusions of law of the suppression judge, the Honorable Robert S. Gawthrop, III, of the Court of Common Pleas of Chester County, Pennsylvania ..... 33a

Appendix E: Transcript of videotape of the defendant, Richard Waggoner, at the Tredyffrin Township police station, July 24, 1986 ..... 41a

## TABLE OF AUTHORITIES

Page

CASES:

*Commonwealth v. Carey*, 26 Mass. App. Ct. 339, 526 N.E.2d 1329 (1988) ..... 7

*Commonwealth v. Karash*, 513 Pa. 5, 518 A.2d 537 (1986) ..... 12

*Commonwealth v. Mahoney*, 400 Mass. 524, 510 N.E.2d 759 (1987) ..... 8, 11

*Commonwealth v. Miller*, 367 Pa. Super. 359, 532 A.2d 1186 (1987) ..... 5

*Commonwealth v. Richman*, 458 Pa. 167, 320 A.2d 351 (1974) ..... 12, 13

*Commonwealth v. Travaglia*, 502 Pa. 474, 467 A.2d 288 (1983), *cert. denied*, 467 U.S. 1256 (1984) ..... 13

*Commonwealth v. Waggoner*, 373 Pa. Super. 23, 540 A.2d 280 (1988) ..... 3

*Commonwealth v. Zabala*, 310 Pa. Super. 301, 456 A.2d 622 (1983) ..... 12

*Connecticut v. Barrett*, 479 U.S. ___, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987) ..... 18

*Doe v. United States*, 487 U.S. ___, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988) ..... 8

*Edwards v. Arizona*, 451 U.S. 477 (1981) ..... 10, 21

*Gilbert v. California*, 388 U.S. 263 (1967) ..... 14

*Jones v. State*, 745 S.W.2d 94 (Tex. Ct. App. 1988) (Discretionary review granted April 27, 1988) ..... 11

*Lanford v. People*, 159 Colo. 36, 409 P.2d 829 (1966) ..... 8

TABLE OF AUTHORITIES–Continued

Page

*Macias v. State*, 515 So.2d 206 (Fla. 1987) ..... 8

*Michigan v. Long*, 463 U.S. 1032 (1983)..... 12, 22

*Michigan v. Tucker*, 417 U.S. 433 (1984) ..... 19

*Miffleton v. State*, 728 S.W.2d 880 (Texas Ct. App. 1987)..... 14

*Miranda v. Arizona*, 384 U.S. 436 (1966)..... *passim*

*New York v. Quarles*, 467 U.S. 649 (1983)..... 19

*Oregon v. Elstad*, 470 U.S. 298 (1985)..... 19

*Oregon v. Haas*, 420 U.S. 714 (1975)..... 13

*Oxholm v. District of Columbia*, 464 A.2d 113 (D.C. App. 1983) ..... 8

*Palmer v. State*, 604 P.2d 1106 (Alaska 1979) ..... 8, 11

*Patterson v. Illinois*, 487 U.S. ___, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988)..... 15

*Pennsylvania v. Bruder*, ___ U.S. ___, 57 U.S.L.W. 3311 (1988)..... 7

*People v. Burhans*, 166 Mich. App. 758, 421 N.W.2d 285 (1988)..... 8, 11, 14

*People v. Jacquin*, 71 N.Y.2d 825, 522 N.E.2d 1026, 527 N.Y.S.2d 728 (1988)..... 11

*People v. Krueger*, 82 Ill.2d 305, 412 N.E.2d 537 (1980), *cert. denied*, 451 U.S. 1019, 101 S.Ct. 3009, 69 L.Ed.2d 390 (1981)..... 18

*Piqua v. Hinger*, 15 Ohio St.2d 110, 238 N.E.2d 766, *cert. denied*, 393 U.S. 1001 (1968) ..... 8

*Rhode Island v. Innis*, 446 U.S. 291 (1980) ..... 10, 11

*Smith v. Illinois*, 469 U.S. 91 (1984)..... 17, 18

TABLE OF AUTHORITIES–Continued

Page

*South Dakota v. Neville*, 459 U.S. 553 (1983) ...7, 10, 11, 22

*State v. Bottomly*, 208 N.J. Super. 82, 504 A.2d 1223 (Law Div. 1984), *aff'd*, 209 N.J. Super. 23, 506 A.2d 1237 (App. Div. 1986) ..... 8

*State v. Breeden*, 374 N.W.2d 560 (Minn. Ct. App. 1985) ..... 8

*State v. Finley*, 173 Mont. 162, 566 P.2d 1119 (1977) ..... 8

*State v. Haefer*, 110 Wis.2d 381, 328 N.W.2d 894 (Ct. App. 1982) ..... 8

*State v. Mannion*, 414 N.W.2d 119 (Iowa 1987) ..... 8

*State v. Palmer*, 206 Conn. 40, 536 A.2d 936 (1988) ..... 8

*State v. Roadifer*, 346 N.W.2d 438 (S.D. 1984) ..... 8

*United States v. Dionisio*, 410 U.S. 1 (1973) ..... 7

*United States v. Gouveia*, 467 U.S. 180 (1984) ..... 12

*United States v. Wade*, 388 U.S. 218 (1967) .....7, 13, 14

STATUES & RULES:

28 U.S.C. § 1257(3) ..... 1

35 P.S. § 780-113(a)(16) ..... 3

75 Pa. C.S.A. § 3731(a)(1) ..... 3

75 Pa. C.S.A. § 3731(a)(3) ..... 3

Pa. R.A.P. 1921 ..... 4

Pa.R.Civ.P. 4017.1 ..... 14

Pa.R.Crim.P. 9015 ..... 14

Pa.R.Crim.P. 9015A ..... 14

TEXTS:

Annot. 41 A.L.R. 812 § 16 ..... 8

17 *Pa. Bulletin* 3400 (August 15, 1987) ..... 14

## PRAYER

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Superior Court of Pennsylvania, authored by President Judge Cirillo, and entered in this case on April 4, 1988.

## OPINIONS BELOW AND JURISDICTION

The findings of fact and conclusions of law of the suppression judge are reprinted at Appendix D. The Opinion of the suppression judge/trial judge is unreported and is reprinted at Appendix C.

The judgment and opinion of the Superior Court of Pennsylvania, which vacated the judgment of sentence of the Court of Common Pleas of Chester County, Pennsylvania and remanded for a new trial, is reported at 373 Pa. Super. 23, 540 A.2d 280 (1988). That opinion was handed down on April 4, 1988, and is reprinted at Appendix B. The Supreme Court of Pennsylvania denied the Commonwealth's Petition for Allowance of Appeal in an unreported order dated October 19, 1988 and docketed at No. 444 E.D. Allocatur Docket, 1988. That Order is reprinted at Appendix A.

The jurisdiction of this Court to review the judgment and opinion of the Superior Court of Pennsylvania, Philadelphia District, is invoked pursuant to 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 5, which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment 6, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## STATEMENT OF THE CASE

In Chester County, Pennsylvania a defendant who has been arrested for Driving while under the influence of alcohol may be videotaped performing physical coordination tests so that a permanent, probative record of his condition can be preserved and shown to the jury at trial.

The Superior Court of Pennsylvania held in *Commonwealth v. Waggoner*, 373 Pa.Super. 23, 540 A.2d 280 (1988), *infra* at Appendix B, that the utterances of defendant incident to the videotaping constituted testimonial evidence which could not be admitted at trial absent a waiver by defendant of his constitutional rights pursuant to the *Miranda* ruling. Implicitly, that court also concluded that instructional advice given concerning the coordination tests constituted interrogation of the defendant. The Superior Court also held that once defendant was arrested, his Sixth Amendment right to counsel attached, forbidding the police from making an audio recording of his voice (but not forbidding a video recording of his actions) unless defendant explicitly waived his right to the presence of counsel. Finally, Superior Court concluded that defendant had not waived his constitutional rights, and that the entire audio portion of the videotape should have been suppressed. A new trial was ordered.

On January 21, 1987, following a trial before the Honorable Robert S. Gawthrop, III[1], and a jury, defendant, Richard C. Waggoner, was found guilty of Driving while under the influence of alcohol, 75 Pa. C.S.A. § 3731(a)(1). The jury found defendant not guilty of Driving while under the combined influence of alcohol and any controlled substance, 75 Pa. C.S.A. § 3731(a)(3) and Possession of a controlled substance (Darvon), 35 P.S. § 780-113(a)(16). Post-trial motions were denied and, on

---

[1] Judge Gawthrop now sits on the United States District Court for the Eastern District of Pennsylvania.

February 2, 1987, defendant was sentenced to the legislatively mandated minimum sentence for second offenders, a period of imprisonment of not less than thirty days and to a non-mandatory maximum sentence of not more than twenty-three months. The June 9, 1987 opinion of the trial judge, Judge Gawthrop, is unreported, but is included *infra* at Appendix C.

The only issues raised on defendant's direct appeal pertained to Judge Gawthrop's rulings, *infra* at Appendix D, following the completion of the suppression hearing held on January 20, 1987. At that hearing, it was established that at approximately 1:30 a.m. on July 24, 1986 Officer Lester J. Neri of the Tredyffrin Township Police Department arrested defendant for Driving while under the influence of alcohol. The probable cause for that arrest was not challenged. Defendant was read his *Miranda* warnings at the scene of the arrest. Defendant expressed an understanding of all of his constitutional rights and validly waived all of those rights (N.T. 1/20/87, 15-18).

Defendant was transported to Paoli Memorial Hospital where he refused to submit to a blood test (N.T. 1/20/87, 19-21). Defendant was then transported to the Tredyffrin Township Police Headquarters where he was advised that the physical coordination tests and interview would be videotaped (N.T. 1/20/87, 22).[2]

---

[2] The audio portion of the videotape has been transcribed and is reprinted at Appendix E. The actual videotape was introduced into evidence at the suppression hearing (N.T. 1/20/87, 24). Accordingly, it constituted part of the record on appeal, Pa.R.A.P. 1921, and remains available for examination

(Continued on following page)

At the beginning of the videotape Officer Neri, in an exercise of caution, read defendant his *Miranda* warnings for a second time within 75 minutes. During the *Miranda* warnings defendant remarked to Officer Neri that he could not afford an attorney. However, after further explanation of his rights, defendant agreed to answer some questions and to perform certain physical coordination tests. The videotape depicts the reading of the *Miranda* warnings, the horizontal gaze nystagmus test,[3] defendant's inability to perform physical coordination tests, conversation during those tests, defendant's attempting to count from one to thirty, and the interrogation of defendant concerning the facts and circumstances of the alleged offense.

Following the ruling of the Superior Court of Pennsylvania granting defendant a new trial, the Commonwealth filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania in which the Commonwealth sought discretionary review of the erroneous federal constitutional holdings contained within Superior Court's ruling. All issues contained in the instant Petition for Writ of Certiorari were presented first to the Supreme

---

(Continued from previous page)

by this Court. Counsel urges this Court to obtain the record and review the actual videotape since a cold transcript cannot fully reflect how probative the tape is in its demonstration of defendant's intoxication.

[3] The horizontal gaze nystagmus test is used to estimate a suspect's blood alcohol content based on the extent of the rhythmic oscillation of the suspect's eyeballs while he is focusing on a moving object. *See generally Commonwealth v. Miller*, 367 Pa. Super. 359, 532 A.2d 1186 (1987).

Court of Pennsylvania. The Commonwealth's Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania in an unreported order dated October 19, 1988 and docketed at No. 444 E.D. Allocatur Docket 1988, *infra* at Appendix A.

## REASON FOR GRANTING THE WRIT

**1. THE SUPERIOR COURT OF PENNSYLVANIA HAS REQUIRED A WAIVER OF RIGHTS PURSUANT TO *MIRANDA* AND THE PRESENCE OF COUNSEL BEFORE THE AUDIO PORTION OF A VIDEOTAPE OF AN ARRESTED DRUNK DRIVER MAY BE ADMITTED INTO EVIDENCE. THAT RULING, PREMISED UPON AT LEAST FIVE ERRONEOUS FEDERAL CONSTITUTIONAL CONCLUSIONS, HAS CREATED A CONFLICT WITH OTHER STATES AND HAS UNJUSTIFIABLY COMMANDED TRIAL COURTS TO EXCLUDE THE MOST PROBATIVE EVIDENCE OF A DEFENDANT'S INTOXICATION.**

**Question #1**

Drunk driving trials frequently become swearing contests between police officers testifying that a defendant was under the influence of alcohol and a defendant who claims that the police officers are exaggerating or otherwise mistaken in their testimony. Even when breath or blood test results are available, the accuracy of those tests are attacked during the trial and the respective credibility of the police officer and the defendant is no less relevant. In the instant case, defendant refused to submit to a blood test and the only available evidence of defendant's intoxication was the testimony of the arresting officers. In order to provide the jury with the

best and most probative evidence, some police departments videotape alleged drunk drivers immediately following their arrest.[4] During the videotaping, police officers will ask a defendant to perform physical coordination tests. They may also ask the defendant to recite the alphabet or to count through a sequence of numbers so that the jury can hear the physical properties of defendant's voice and evaluate the effect of alcohol on the defendant.

This Court has previously held that use of a defendant's voice as an identifying physical characteristic or for the purpose of evaluating the physical properties of that voice does not violate defendant's Fifth Amendment rights. *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Wade*, 388 U.S. 218 (1967). There is nothing which is substantively incriminating in counting a sequence of numbers, or in other conversation incident to the videotaping process.

This case presents the issue recognized but not reached in *Pennsylvania v. Bruder*, ___ U.S. ___, ___ n.3, 57 U.S.L.W. 3311, 3311 n.3 (1988)(reversing the Opinion by Cirillo, P.J.) ("We thus do not reach the issue of whether recitation of the alphabet in response to custodial questioning is testimonial and hence admissible under *Miranda v. Arizona*, 384 U.S. 436 (1966)."); and in *South Dakota v. Neville*, 459 U.S. 553 (1983) concerning "the distinction between real or physical evidence, on the one hand, and

---

[4] *Commonwealth v. Carey*, 26 Mass. App. Ct. 339, 526 N.E.2d 1329 (1988) collects cases from eight other states indicating that videotaping of alleged drunk drivers is becoming a routine practice. The list of states in that opinion is not exhaustive.

communications or testimony, on the other [hand]. . . ." *Id.* at 561.[5]

The ruling below is in conflict with the rulings on this issue by other state courts which have concluded that statements incident to physical coordination tests including the recitation of the alphabet or the counting of numbers are not testimonial evidence within the purview of the Fifth Amendment.[6]

---

[5] At the time of its decision, the Superior Court of Pennsylvania did not have the benefit of this Court's most recent discussion of the issue in which this Court concluded that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe v. United States*, 487 U.S. ___, ___, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184, 197 (1988)(footnote omitted).

[6] *Palmer v. State*, 604 P.2d 1106 (Alaska 1979); *Lanford v. People*, 159 Colo. 36, 409 P.2d 829 (1966); *Oxholm v. District of Columbia*, 464 A.2d 113 (D.C. App. 1983); *State v. Mannion*, 414 N.W.2d 119 (Iowa 1987)(dictum); *Commonwealth v. Mahoney*, 400 Mass. 524, 510 N.E.2d 759 (1987); *People v. Burhans*, 166 Mich. App. 758, 421 N.W.2d 285 (1988); *State v. Breeden*, 374 N.W.2d 560 (Minn. Ct. App. 1985); *State v. Finley*, 173 Mont. 162, 566 P.2d 1119 (1977); *State v. Bottomly*, 208 N.J. Super. 82, 504 A.2d 1223 (Law Div. 1984), *aff'd*, 209 N.J. Super. 23, 506 A.2d 1237 (App. Div. 1986); *Piqua v. Hinger*, 15 Ohio St.2d 110, 238 N.E.2d 766, *cert. denied*, 393 U.S. 1001 (1968); *State v. Roadifer*, 346 N.W.2d 438 (S.D. 1984); *State v. Haefer*, 110 Wis.2d 381, 328 N.W.2d 894 (Ct. App. 1982); Annot. 41 A.L.R. 812 § 16 at 848-55 and cases cited therein. *Cf. State v. Palmer*, 206 Conn. 40, 536 A.2d 936 (1988); *Macias v. State*, 515 So.2d 206 (Fla. 1987).

In this context, a determination of the borderline between testimonial and non-testimonial utterances presents an issue of profound public importance, involving a conflict among the states and is worthy of a grant of discretionary review by this Court.

**Question #2**

The Commonwealth of Pennsylvania disagrees with the conclusion of the court below that the police were required to obtain a *Miranda* waiver before the audio portion of the videotape could be admissible at trial. Before *Miranda* warnings and a waiver are required, it is necessary that a defendant be subjected to custodial interrogation. The Commonwealth concedes that this defendant was in custody. Except for the final portion of the videotape, this defendant was not subject to interrogation.

The police conduct during the videotaping can be divided into three parts. During the first part, the police advised defendant, for the second time, of his constitutional rights pursuant to *Miranda*. During the second part, the police asked the defendant to perform physical coordination tests. While performing one of the coordination tests, the defendant was asked to count. During the third part, the police asked the defendant questions pertaining to the incident for which he had been arrested. The Commonwealth acknowledges that the police conduct during the third part of the videotape constituted interrogation. The Commonwealth contends that defendant's statements on the remainder of the audio portion

of the videotape are not the product of police interrogation.[7]

This Court has defined interrogation to encompass "words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). On the other hand, "[i]n the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood alcohol test is not an interrogation within the meaning of *Miranda* [since] police words or actions normally attendant to arrest and custody do not constitute interrogation." *South Dakota v. Neville*, 459 U.S. 553, 564 n.15 (1983).

---

[7] The Commonwealth of Pennsylvania acknowledges that the final portion of the videotape, consisting of Officer Neri asking the defendant questions about the offense while the two of them are seated at a desk, constituted police interrogation of the defendant. The Commonwealth contends that defendant did not assert a right to counsel and did validly waive his rights. If this Court disagrees, then the interrogation portion of the videotape would have to be suppressed. However, since Superior Court's suppression order was overbroad and extended to the *entire* audio portion of the videotape, it would still be necessary for this Court to address the admissibility of the earlier portions of the videotape. It would also be necessary to address Question 6 concerning the applicability of *Miranda v. Arizona* and *Edwards v. Arizona* to videotaped statements by a defendant.

If this Court determines either that the earlier portions of the videotape are not testimonial or that the instructions by the police officer to the defendant as to how to perform the tests are not interrogation, then the remaining questions presented in this Petition need not be reached.

The police conversation with defendant during the performance of the physical coordination tests was merely to instruct defendant concerning the performance of the tests. Police questions were merely to determine whether defendant understood the instructions. These questions were not designed to elicit any substantively incriminating responses. In fact, the questions were for defendant's benefit so that the police would not incorrectly conclude that defendant's intoxication prevented him from performing tests when the reason was his inability to understand the officer's instructions. The decision of the court below is in conflict with other state courts which have concluded that similar police conduct does not constitute interrogation.[8]

Although the wording of the police instructions is not as formalized as the language used by the police in *Neville,* there is a substantial likelihood that this Court may find that the court below erred in concluding that police instructions incident to the videotaping process constituted impermissible interrogation. It is essential for this Court to grant discretionary review and provide guidance to law enforcement personnel as to the relationship of this necessary investigative procedure to the *Innis – Neville* standards.

---

[8] *Palmer v. State,* 604 P.2d 1106 (Alaska 1979); *Commonwealth v. Mahoney,* 400 Mass. 524, 510 N.E.2d 759 (1987); *People v. Burhans,* 166 Mich. App. 758, 421 N.W.2d 285 (1988); *People v. Jacquin,* 71 N.Y.2d 825, 522 N.E.2d 1026, 527 N.Y.S.2d 728 (1988). *Contra, Jones v. State,* 745 S.W.2d 94 (Tex. Ct. App. 1988) (Discretionary review granted April 27, 1988) (submitted on briefs October 12, 1988).

**Question #3**

In the instant case the Superior Court of Pennsylvania held that this defendant's Sixth Amendment right to counsel attached at arrest. Based on this premise Superior Court concluded that the police could not audiotape defendant, after arrest, without obtaining a valid waiver by defendant of his Sixth Amendment rights.

Any claim that, as a matter of federal constitutional law, the right to counsel attaches at arrest, was explicitly refuted by this Court:

> Our speedy trial cases hold that [the] Sixth Amendment right [to a speedy trial] may attach before an indictment and as early as the time of arrest and holding to answer a criminal charge, *but we have never held that the right to counsel attaches at the time of arrest.*

*United States v. Gouveia*, 467 U.S. 180, 190 (1984) (citations omitted)(emphasis added).

There is no independent state ground to support the holding of the court below that the Sixth Amendment right to counsel attaches at arrest. All references in the lower court's opinion are to the Sixth Amendment and not to any provision of the Pennsylvania Constitution. There is no plain statement that the decision was based on independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983).

Superior Court cited two cases in support of the position that in Pennsylvania the right to counsel attaches at arrest, *Commonwealth v. Karash*, 513 Pa. 6, 518 A.2d 537 (1986); and *Commonwealth v. Zabala*, 310 Pa. Super. 301, 456 A.2d 622 (1983). Both of those cases were premised upon *Commonwealth v. Richman*, 458 Pa. 167, 320 A.2d 351

(1974). In *Richman*, the Supreme Court of Pennsylvania concluded that the decisions of this Court gave Pennsylvania the right to fix, pursuant to the Sixth Amendment, the time at which adversary criminal proceedings are initiated. *Richman* was not decided pursuant to any state constitutional provision despite the urging of the authors of concurring opinions in that case. The Supreme Court of Pennsylvania has never definitively held that the Pennsylvania Constitution provides a right to counsel at all post-arrest confrontations between the police and the defendant. *Commonwealth v. Travaglia*, 502 Pa. 474, 467 A.2d 288 (1983), *cert. denied*, 467 U.S. 1256 (1984).

"[A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. But, of course, a State may not impose greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Oregon v. Haas*, 420 U.S. 714, 719 (1975)(footnote and citations omitted)(emphasis in original). Pennsylvania has violated this principle of law and this Court must reassert its authority as the final arbiter of the United States Constitution.

**Question #4**

Assuming, *arguendo*, that the right to counsel attaches at arrest, neither the videotaping nor the audiotaping of physical coordination tests is a "critical stage" entitling defendant to the presence of counsel.

As recognized in *United States v. Wade*, 388 U.S. 318 (1967), a pre-trial proceeding is a critical stage if the presence of counsel is necessary to preserve the defendant's right to meaningfully cross-examine the witnesses

against him. *Wade* held that a pre-trial line-up was such a critical stage based on the history of police misconduct involving line-ups, the hazard of unfair suggestive influences, and the inability of a defendant to reconstruct the nature of the line-up at trial, thus preventing him from attacking any impropriety at the line-up. *Gilbert v. California*, 388 U.S. 263 (1967) held that a handwriting exemplar was not a "critical stage" because it was a scientifically reliable procedure, the results of which could be effectively tested by defendant through cross-examination.

Defendant does not challenge that videotaping is a scientifically reliable procedure which has been approved in the Commonwealth of Pennsylvania. Pa.R.Crim.P. 9015, Comment; Pa.R.Civ.P. 4017.1. *See also* Proposed Rules of Criminal Procedure 9015 and 9015A reprinted at 17 *Pa. Bulletin* 3400 (August 15, 1987). Defendant does not contend that in this particular case there was anything unreliable about the videotape of defendant. The presence of a clock, superimposed on the screen at the beginning and end of the tape, shows that there was no splicing. There is no history of police misconduct involving the videotaping of defendants. Unlike a line-up, this videotaping procedure could be effectively reconstructed at trial since the actual videotape is introduced at trial. The existence of the videotape improves rather than lessens defendant's ability to conduct an effective cross-examination of the police officers. Other state courts have concluded that the videotaping of physical coordination tests, including the audio portion, is not a critical stage at which defendant is entitled to counsel.[9]

---

[9] *People v. Burhans*, 166 Mich. App. 758, 421 N.W.2d 285 (1988); *Miffleton v. State*, 728 S.W.2d 880 (Texas Ct. App. 1987).

The court below concluded that the videotaping of defendant performing the physical coordination tests was not a critical stage entitling defendant to the Sixth Amendment right to counsel. Inexplicably, that court reached an exactly contrary conclusion with respect to the audio portion of the videotape, holding that the videotaping is transformed into a critical stage if the sound is turned on. Superior Court erred in concluding that the addition of an audio portion to the tape changes the constitutional result.

This Court should grant discretionary review to review this anomalous and legally unjustifiable holding and to clarify the scope of the Sixth Amendment right to counsel.

**Question #5**

Assuming, *arguendo*, that the right to counsel attached at arrest, police interrogation of the defendant was not forbidden unless defendant sought to exercise his right to have counsel present. *Patterson v. Illinois*, 487 U.S. ___, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). An accused who is given the *Miranda* warnings and validly waives his rights may be interrogated even after the Sixth Amendment right to counsel has attached. *Id.* The court below erred in concluding that defendant did not validly waive his constitutional right to counsel under either the Fifth or Sixth Amendments.[10]

---

[10] At the time of its decision, the Superior Court of Pennsylvania did not have the benefit of the *Patterson v. Illinois* ruling.

Defendant was first read his *Miranda* warnings at the scene of the arrest. Defendant expressed an understanding of all of his constitutional rights (N.T. 1/20/87, 15-18). Officer Neri set forth defendant's response to the final question asked of him at the scene of the arrest:

> Q. What was the last question?
>
> A. The last question, understanding these rights and having them in mind, do you wish to give up these rights and talk to me now?
>
> Q. What, if anything, occurred after you asked that question?
>
> A. Well, at first, the defendant didn't respond at all and I asked him if he understood, and just about at that point in time, Officer Reider turned and walked towards his patrol car and the defendant stated to me, "I will talk to you, but I'm not going to talk to him," referring to Officer Reider as him.

(N.T. 1/20/87, 18).

After refusing to submit to a blood test at the hospital, defendant was transported to the Tredyffrin Township Police Headquarters where the videotaping took place. Defendant was advised by Officer Neri that he would be again read his *Miranda* warnings as he was read them at the scene of the arrest. The relevant portion of those warnings, as contained on the videotape, proceeded as follows:

> OFFICER NERI: You have the right to talk to a lawyer before answering any questions, and have a lawyer with you before and during questioning. Do you understand this?
>
> THE DEFENDANT: Yes.
>
> OFFICER NERI: If you cannot afford a lawyer, you have the right to have a free lawyer appointed for

you before any questions are asked and during any questioning. This free lawyer is at no expense or cost to you. Do you understand this?

THE DEFENDANT: I can't afford a lawyer.

OFFICER NERI: Understanding these rights and having them in mind, do you wish to give up these rights and talk to me now?

THE DEFENDANT: About what?

OFFICER NERI: Well there will be some questions I have here. If you wish to answer them you may, and if you don't you can just refuse to answer them and that's perfectly all right.

THE DEFENDANT: Well, ask them.

OFFICER NERI: Okay.

THE DEFENDANT: Now, I may answer them; I may not.

OFFICER NERI: That's fine.

THE DEFENDANT: It depends. As I said, it depends on what the question is. Okay.

OFFICER NERI: That's okay.

THE DEFENDANT: All right.

The Commonwealth contends that the comment, "I can't afford a lawyer," did not constitute an invocation by defendant of his right to counsel. In *Smith v. Illinois*, 469 U.S. 91 (1984) this Court noted the following tests that have been applied around the country to ambiguous or equivocal statements concerning the right to counsel:

> Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. Others have attempted to define a threshold standard of clarity

> for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. *See, e.g., People v. Krueger*, 82 Ill.2d 305, 311, 412 N.E.2d 537, 540 (1980) ("[A]n assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity," but not "every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel"), *cert. denied*, 451 U.S. 1019, 101 S.Ct. 3009, 69 L.Ed.2d 390 (1981). Still others have adopted a third approach, holding that when an accused makes an equivocal statement that "arguably" can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel.

*Smith* at 96 n.3 (citations omitted).

In the instant case, when the defendant was read his *Miranda* warnings at the scene of the arrest, he agreed to talk to Officer Neri but not to Officer Reider (N.T. 1/20/87, 18). As in *Connecticut v. Barrett*, 479 U.S. 523 (1987) the police honored this request. Only Officer Neri conducted the physical coordination tests and only Officer Neri interviewed defendant.

When defendant was given his *Miranda* warnings for the second time, during the videotaping, his statement that he could not afford a lawyer was not inconsistent with his previously expressed willingness to talk to Officer Neri. This fact was recognized by the suppression judge, Judge Gawthrop, during his adjudication following the completion of the suppression hearing:

> This defendant was articulate to the point of glibness on the night in question, and all he had to do was say: "I want a lawyer" or "I don't want to talk to you until I have a lawyer." He made a casual, offhand

> remark as to his penury, but that is all. As such, we do not find that to be a genuine invocation, expression of desire to have counsel, particularly in light of his response there.

N.T. 1/20/87, 29, *infra* at Appendix D, 36a.

The Commonwealth contends that defendant never invoked his right to counsel. At most, this was a situation where defendant sent out mixed signals to the police concerning his desire for counsel. Any ambiguity in that respect was clarified properly by Officer Neri who ascertained that, consistent with defendant's full and valid waiver of rights at the scene of the arrest, defendant was willing to make a statement, at least to Officer Neri. Since there was no invocation by defendant of his right to counsel, and since there was a valid waiver of that right, none of the statements on the videotape should have been suppressed.

Miranda warnings advise a defendant of his "right" to remain silent, his "right" to counsel, and his "right" to free counsel if he is indigent. However, it is now well established that the "prophylactic *Miranda* warnings . . . are not themselves rights protected by the Constitution but are instead measures to ensure that the right against compulsory self-incrimination is protected. Requiring Miranda warnings before custodial interrogation provides practical reinforcement for the Fifth Amendment right." *Oregon v. Elstad*, 470 U.S. 298, 305 (1985) (citations omitted). *New York v. Quarles*, 467 U.S. 649 (1983); *Michigan v. Tucker*, 417 U.S. 433 (1974). The fundamental question remains whether, under the facts of this case, defendant was compelled to incriminate himself.

Superior Court erred by focusing on whether defendant waived each individual component of the *Miranda* warnings rather than focusing on whether, under the totality of the circumstances, the Commonwealth established a waiver of the underlying constitutional right.

This Court should grant discretionary review to promulgate a standard governing the waiver of the Sixth Amendment right to counsel in the face of ambiguous remarks by a defendant in custody, and to correct the Superior Court's erroneous analysis of that issue in the instant case.

**Question #6**

A review of the original *Miranda* decision reveals that the need for that decision was premised on historical examples of physical brutality or psychological stratagems inflicted upon defendants interrogated in the privacy and secrecy of the police station. The *Miranda* Court stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant." *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) (emphasis added). The *Miranda* Court disclaimed any intent to create a "constitutional straitjacket" and invited Congress and the States to suggest "potential alternatives for protecting the privilege." *Id.* at 467.

When a defendant's statements to the police are preserved on videotape, the privacy and secrecy that formed the basis for the *Miranda* doctrine have been eliminated. The Commonwealth of Pennsylvania asks this Court to

create an exception to the *Miranda* doctrine for videotaped statements of a defendant since the videotape will reveal whether defendant's statements were compelled against his will. The basis for this exception is from Justice White's dissenting opinion in *Miranda*:

> Even if one were to postulate that the Court's concern is not that all confessions induced by police interrogation are coerced but rather that some such confessions are coerced and present judicial procedures are believed to be inadequate to identify the confessions that are coerced and those that are not, it would still not be essential to impose the rule that the Court has now fashioned. *Transcripts or observers could be required,* specific time limits, tailored to fit the cause, could be imposed, or other devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession.

*Miranda* at 535 (White, J. dissenting)(emphasis added).

Alternatively, the Commonwealth asks this Court to create an exception to the per se rule of *Edwards v. Arizona,* 451 U.S. 477 (1981), governing the waiver of rights following an assertion by a defendant of a right to counsel. In the instant case, defendant was advised completely and correctly of all his legal rights on two occasions within 75 minutes. Although he declared his inability to afford counsel, a review of the videotape clearly demonstrates that defendant's utterances while on videotape were not compelled against his will. Given the existence of two complete readings of rights and a videotape making complete appellate review possible, the Commonwealth asks this Court, if it is necessary to reach the issue, to find a valid waiver of defendant's rights.

Each of the erroneous holdings by the court below was a federal constitutional holding. All references in the Superior Court's opinion were to the Fifth and Sixth Amendments, not to any state constitutional equivalents. There is no plain statement that the decision was based on independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983).

"The situation underlying this case – that of the drunk driver – occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having daily contact with the problem that the state courts have, has repeatedly lamented the tragedy." *South Dakota v. Neville*, 459 U.S. 553, 558 (1983).

The holding of the Superior Court of Pennsylvania can only contribute to that carnage by excluding from trials highly probative evidence of a defendant's guilt or innocence. When a state court erroneously finds a federal constitutional prohibition against the admission of that evidence, when the state court's federal constitutional holdings are in conflict with this Court and with the apparently unanimous views of other state courts, and when the issue is one of public importance, this Court should not merely lament the tragedy; instead, this Court should exercise its power of discretionary review.

## CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this Petition for Writ of Certiorari be granted as to all questions presented.

Respectfully submitted,

STUART SUSS, ESQUIRE
Deputy District Attorney
(Counsel of Record)

JAMES P. MACELREE, II, ESQUIRE
District Attorney, Chester County
17 North Church Street
Courthouse Annex – Second Floor
West Chester, PA 19380
(215) 431-6801
*Counsel for Petitioner*

## APPENDIX A

(LOGO)

**Supreme Court of Pennsylvania**

MARLENE F. LACHMAN,
ESQ.
PROTHONOTARY
PATRICK TASSOS
DEPUTY PROTHONOTARY

**Eastern District**

468 CITY HALL
PHILADELPHIA, PA 19107
(215) 496-4600

October 24, 1988

Stuart Suss, Esquire
Deputy District Attorney
17 North Church Street
Courthouse Annex - 2nd Floor
West Chester, PA 19380

RE: Commonwealth of Pennsylvania, Petitioner v. Richard Waggoner NO. 444 E.D. ALLOCATUR DOCKET 1988

Dear Mr. Suss:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"October 19, 1988.

Petition Denied.

Per Curiam."

Very truly yours,
/s/ Patrick Tassos
PATRICK TASSOS
Deputy Prothonotary

/mz
cc: Sara R. Nichols, Esquire

## APPENDIX B

J. 77008/87

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| V. | : | No. 703 Philadelphia 1987 |
| RICHARD WAGGONER, Appellant | : | |

### JUDGMENT

ON CONSIDERATION WHEREOF, if is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of CHESTER County be, and the same is hereby REVERSED AND REMANDED FOR A NEW TRIAL. JURISDICTION RELINQUISHED.

BY THE COURT:

/s/ David A. Szewczak
PROTHONOTARY

Dated: APRIL 4, 1988

---

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| V. | : | No. 703 Philadelphia 1987 |
| RICHARD WAGGONER, Appellant | : | |

Appeal from the Judgment of Sentence February 2, 1987 in the Court of Common Pleas of Chester County, Criminal, No. 2070-86.

FILED APR -4 1988

BEFORE: CIRILLO, P.J., and BROSKY and BECK, JJ.

OPINION BY CIRILLO, P.J.:

This is an appeal from a judgment of sentence entered in the Court of Common Pleas of Chester County. We reverse and remand for a new trial.

At approximately 1:30 a.m. on July 24, 1986, Patrolman Lester J. Neri of the Tredyffrin Township Police Department arrested the appellant, Richard Waggoner, for driving under the influence of alcohol. At the time, Officer Neri requested Waggoner to perform a field sobriety test. Following the test, Neri read Waggoner his *Miranda* warnings and advised him of the Implied Consent Law, 75 Pa. C.S. § 1547. Waggoner was then transported to Paoli Memorial Hospital. At the hospital, Waggoner refused to submit to a blood test. Subsequently, Waggoner was taken to the Tredyffrin Township Police Station where he was informed that he was to be videotaped. While on camera, Neri read Waggoner his *Miranda* warnings again. With one exception, Waggoner answered in the affirmative when asked if he understood each right as it was read to him. That exception occurred when Waggoner was asked by Neri if he had understood that a lawyer could be appointed for him free of charge before any questioning. Waggoner answered, "I can't afford a lawyer." Officer Neri responded to Waggoner's reply by simply continuing to read Waggoner the remaining *Miranda* warnings.

As the taping continued, Waggoner reenacted the field sobriety tests he had performed at the scene of his arrest. During the tests, Waggoner asked Officer Neri for clarification of the instructions on how to perform various parts of the tests and commented several times on the quality of his performance. He made it clear during the videotaping that he had arthritis of his hip and knee

but was still willing to cooperate with the testing. Upon completion of the field sobriety tests, Neri interviewed Waggoner. In the middle of the interview, Neri asked Waggoner if he had been drinking alcoholic beverages recently. After asking Neri to clarify what time frame was involved, Waggoner responded that he had been drinking alcohol three hours before his arrest and detention. After a few more questions, the interview and the taping terminated.

Following a jury trial before the Honorable Robert S. Gawthrop, III, Waggoner was found guilty of driving while under the influence of alcohol pursuant to 75 Pa. C.S. § 3731 (a)(1). Waggoner's post-trial motions were denied, and he was sentenced to a period of imprisonment of not less than thirty days nor more than twenty-three months. This appeal ensued.

On appeal, Waggoner raises the issue of whether the trial court erred in failing to suppress the videotape depicting him making an inculpatory statement and reenacting the field sobriety tests. Waggoner argues that admission of the videotape violated his fifth and sixth amendment rights which are applicable to the states through the fourteenth amendment. Furthermore, Waggoner claims that he invoked his right to counsel by the responses he gave to Neri's second reading of his *Miranda* warnings during the videotaping.

## I. Fifth Amendment

The fifth amendment provides each individual with the right not to be compelled to be a witness against oneself in any criminal case. In *Miranda v. Arizona*, 384

U.S. 436 (1966), the Supreme Court established safeguards to ensure that this fifth amendment right is not abrogated by the actions of overzealous police during custodial interrogations. The safeguards created were stated by the *Miranda* court as follows:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. If, however, he indicates in any manner and at any state of the process that he wishes to consult with an attorney before speaking there can be no questioning.

*Id.* at 444-45. Unless these safeguards are followed, *Miranda* prohibits prosecutorial use of a defendant's statements.

In *Schmerber v. California*, 384 U.S. 757 (1966), the Supreme Court held that the fifth amendment "privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, and that the withdrawal of blood" and admission of a blood analysis report does not involve the compulsion prohibited by the fifth amendment. *Id.* at 761. Thereafter, in *Commonwealth v. Kloch*, 230 Pa. Super. 563, 327 A.2d 375 (1975), our Superior Court used *Schmerber* as the basis for ruling that *Miranda* warnings are not required when a defendant is requested to take a field sobriety test. *Id.* at 572, 327 A.2d at 381; *see also Commonwealth v. Benson*, 280 Pa. Super. 20, 29, 421 A.2d 383, 387 (1980) ("requiring a driver to perform physical tests . . . does not violate the privilege against self-incrimination because the evidence

procured is of a physical nature rather than testimonial and therefore no *Miranda* warnings are required."); *accord, State v. Nece*, 206 N.J. Super. 118, 501 A.2d 1049 (Law Div. 1985) (fifth amendment does not apply to physical movements involved in sobriety tests because the movements are nontestimonial). The *Kloch* court stated, "[T]he driver is the source of 'real or physical evidence,' compulsion of which does not come within the purview of the fifth amendment." 230 Pa. Super. at 572, 327 A.2d at 381 (citation omitted). Since requiring a defendant to perform a field sobriety test does not involve the type of compulsion associated with the fifth amendment, no *Miranda* warnings were required prior to videotaping Waggoner performing the physical acts involved in the sobriety tests. *Commonwealth v. Conway*, No. 2570 Philadelphia 1987 (Pa. Super. Ct. Oct. 23, 1987). However, in addition to performing the physical acts involved in the sobriety tests, Waggoner asked questions and made comments during the course of the sobriety tests. Furthermore, after the tests, Waggoner answered questions posed by Officer Neri. These verbalizations are within the purview of the fifth amendment. In *Commonwealth v. Bruder*, ___ Pa. Super. ___, 528 A.2d 1385, (1987) Bruder was stopped by a police officer for driving through a red light. Upon noticing Bruder's demeanor, the police officer asked him to recite the alphabet and walk in a straight line, heel to toe. The court held that although Buder's act of walking in a straight line was a physical test not requiring *Miranda* warnings, his recitation of the alphabet was communicative in nature. Therefore, we held that because the alphabet recitation was elicited before Bruder had received his *Miranda* warnings, the recitation should have been excluded as evidence.

In *Commonwealth v. Conway, Bruder* was utilized in determining whether the audio portion of a videotaped sobriety tests should have been suppressed. In *Conway,* the defendant invoked his right to remain silent and his right to counsel while the *Miranda* warnings were given to him during the videotaping. Following Conway's invocation of these rights, he was filmed performing three sobriety tests. As he performed the tests, Conway spoke to get occasional clarification concerning the officer's oral instructions. The officer also requested that Conway count from 1,001 to 1,030 while balancing on one leg. After Conway had completed the tests, the police officer asked him questions, including how much and what he had drunk prior to his arrest. In concluding that these verbalizations were testimonial, the *Conway* court reasoned:

> [Mr. Conway] was required to give more than physical evidence when he demonstrated his physical coordination on the sobriety tests. The test procedure was structured so that [Mr. Conway] was compelled to reveal his thought processes by asking for clarification of some of the officer's instructions, and his statements in response thereto manifest his confusion. Because confusion is arguably a sign of intoxication, [Mr. Conway] was forced to incriminate himself by 'communicating' his confusion while performing the tests . . . . That [Mr. Conway's] statements are communicative cannot be questioned in light of our conclusion that Mr. Bruder's recitation of the alphabet was communicative. Mr. Bruder was told by the police exactly what to say while *the content* of [Mr. Conway's] statements was more within his volitional control. By seeking clarification of the police officer's instructions, [Mr. Conway] expressed his thought processes far more than did

> Mr. Bruder in his recitation. There is a greater communicative or testimonial aspect in [Mr. Conway's] statements than in Mr. Bruder's recitation.

Slip op. at 12, 14. In addition, the *Conway* court determined that the defendant's statements were compelled. The court theorized that the conduct of the police during the videotaping elicited the testimonial statements the Commonwealth sought to use against him at trial. Because of the pressure to perform the sobriety tests correctly, Conway was compelled to ask for a clarification of the police officer's instructions each time he was unsure whether he had understood them. Finally, the *Conway* court held that because the verbalizations during the videotape procedure were testimonial and compelled, they were covered by the fifth amendment; since Conway had not waived his *Miranda* rights, the audio portion of the videotape was inadmissible at his trial. Similarly in the case at bar, Waggoner's verbalizations during the videotaping must be suppressed unless he made a voluntary, knowing, and intelligent waiver of his rights after receiving his *Miranda* warnings.

## II. Sixth Amendment

The decisions involving the sixth amendment have for the most part concerned questions of how "interrogation" is to be defined in that context, that is, whether the traditional conception of interrogation is to bound the parameters of the sixth amendment analysis. *See generally* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. 1 (1978). We are not faced with the difficult question here of whether or not what occurred between Waggoner and

the police was or was not interrogation in any sense. The cases in which the question has been of importance involve scenarios in which police have made suggestive statements in attempts to elicit information without actually asking for it, *See Brewer v. Williams,* 430 U.S. 387 (1977), or a wired informer has pretended to play the role of confidant to an accused who was not then in a custodial situation, *Massiah v. United States,* 377 U.S. 201 (1964). In this case, there is no question that we are faced with a defendant in a custodial situation. The question we must determine is whether the sixth amendment had attached at that point, and if it had, whether any deliberate attempt had been made to elicit information from him.

Following the rulings of the Supreme Court of the United States, an accused is guaranteed the right to counsel when an attempt is made by the government to deliberately elicit information after the commencement of adversarial proceedings against him. *Maine v. Moulton,* 474 U.S. 159, 170 (1985); *Brewer,* 430 U.S. at 401; *Massiah,* 377 U.S. at 206. Although the Supreme Court has read this to mean that no sixth amendment right attaches prior to the filing of formal charges against the accused, *Rhode Island v. Innis,* 446 U.S. 291, 300 n.4 (1980), relegating the period prior to formal charges to the protection of the fifth amendment, Kamisar, *supra* at 61, the courts of this Commonwealth have seen fit to hold that the right to sixth amendment protection adheres at arrest. *Commonwealth v. Karash,* 513 Pa. 6, 14, 518 A.2d 537, 541 (1986); *Commonwealth v. Zabala,* 310 Pa. Super. 301, 313, 456 A.2d 622, 629 (1983). Since Waggoner had been arrested prior to the videotaping, his sixth amendment right had attached. This does not complete the inquiry, however.

We must then determine whether or not the taping was a critical stage at which he retained his right to counsel.

The sixth amendment ensures that counsel will be present from the inception of the adversarial proceeding at every critical stage of that proceeding. *Michigan v. Jackson*, 475 U.S. 625, ___, 89 L.Ed.2d 631, 638 (1986). This, according to the Supreme Court of the United States, is essential to a fair trial:

> It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment . . . . The presence of counsel at such critical confrontations, as well as at trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution.

*United States v. Wade*, 388 U.S. 218, 226-27 (citations omitted). This court has held that a proceeding is a critical one mandating the presence of counsel if " 'counsel's legal training and expertise may then be employed on behalf of the accused to observe, discover and prevent possible unfairness or irregularity in . . . procedures which may later irreparably prevent a basically unfair determination of guilt or innocence.' " *Commonwealth v. Shirey*, 333 Pa. Super. 85, 104, 481 A.2d 1314, 1324 (1984) (quoting *United States ex rel. Stukes v. Shovlin*, 329 F.Supp. 911, 913 (E.D.Pa. 1971)). We must therefore scrutinize whether substantial prejudice to an accused's rights arises from a particular proceeding, and whether counsel's presence would aid in forestalling that prejudice. *Id.* In this case,

we must consider the nature of the videotaping procedure.

As with our analysis of Waggoner's fifth amendment right to counsel, the visual and audio portions of the videotape require separate treatment. We will first address the visual portion of the videotape. Videotaping of Waggoner's field sobriety tests made exact reconstruction of his performance of the test possible. Instead of being exposed to a police officer's description at trial of how Waggoner had performed the field sobriety tests, Waggoner had his performance accurately captured on tape. Moreover, since the fifth amendment provides no protection against having one's *physical performance* of the tests recorded on videotape, his counsel's presence at the videotaping would have made no difference. Waggoner would have still been required to perform the tests. Furthermore, when the videotape was shown at trial, Waggoner had the opportunity to argue that his poor performance of the tests was due to his arthritic condition rather than to his state of intoxication. Thus, any risk involved in the visual aspect of the videotaped sobriety tests could have been sufficiently cured at trial. Given these factors, the visual taping of Waggoner performing the sobriety tests cannot be labeled a critical stage entitling Waggoner to the sixth amendment's right to counsel.

We turn next to the audiotaping portion of the proceedings. Although we have already determined that the audio portion of the tape must be suppressed because of fifth amendment violations, we will consider Waggoner's sixth amendment arguments. We find that Waggoner's sixth amendment right to counsel had attached at the time of his arrest. As is clear from the record, Waggoner

was being questioned by the officers, and his answers were recorded on tape. As we have stated, the Supreme Court has held deliberately eliciting incriminating information after the sixth amendment right attaches implicates the accused's right to a fair trial. *Jackson*, 475 U.S. at ___, 89 L.Ed.2d at 638; *Moulton*, 474 U.S. at 175 n.11; *Brewer*, 430 U.S. at 401; *Massiah*, 377 U.S. at 206. According to the Court, these attempts at eliciting information, including interrogation in the usual sense, are critical stages at which counsel must be present. *Jackson*, 475 U.S. at ___, 89 L.Ed.2d at 638. As the Supreme Court said in *Escobedo v. Illinois*, 378 U.S. 478 (1964):

> [To hold otherwise] would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination' . . . One can imagine the prosecutor saying: "Let them have the most illustrious counsel now. They can't excape the noose. There is nothing that counsel can do for them at trial." '

*Id.* at 487-88.

Waggoner's counsel, if present during the videotaping, may have been able to prevent at least some of the prejudice which inured to Waggoner as a result of the questions, comments, and statements he made during the taping. His counsel could have prevented him from incriminating himself by advising him to speak as little as possible during the tests and directing him not to answer certain or all of the questions posed by Officer Neri.

Without his counsel's aid, Waggoner was left to ramble on, preserving for everyone who views the videotape his intoxicated demeanor and his incriminating statements. No cross-examination at trial could remedy this memorialization. Therefore, we conclude Waggoner did have a sixth amendment right to counsel during the audiotaping of his sobriety tests and Officer Neri's interrogation. Unless Waggoner waived his right to counsel, the audio component of the videotape should have been suppressed.

## III. Waiver of Right to Counsel

At the scene of his arrest, Waggoner was given his *Miranda* warnings. At the suppression hearing, Officer Neri recounted the details of this first *Miranda* colloquy:

> Q. What was the first question, if any, that you asked the defendant?
>
> A. After giving him Miranda or do you want me to read the Miranda card?
>
> Q. As part of the card, what was the first thing on the card which you asked defendant, if anything?
>
> A. Pursuant to law, I am informing you that I am Officer Lester J. Neri of the Tredyffrin Police Department. I am investigating driving under the influence of alcohol and/or controlled substance. You have the right to remain silent. However, if you say anything, such can and will be used against you in a court of law. Do you understand this?
>
> Q. What, if any, response did defendant make at that time?
>
> A. He stated yes.
>
> Q. What, if any, question did you request next?

A. You have the right to talk to a lawyer before answering the questions. You may have a lawyer with you before and during questioning. Do you understand this?

Q. Do you recall what defendant's response was to that question?

A. The response was yes.

Q. What, if any, other response did he make relative to that question at that time?

A. None.

Q. What was the next question?

A. During questioning, you may stop at any time and refuse to answer any further questions. Do you understand this?

Q. What, if any, response did you receive to that question?

A. Defendant responded yes.

Q. Did he respond yes right away?

A. As far as I can recall.

Q. Do you recall anyone else being present when you asked that question?

A. Officer Reider was right in the general vicinity standing within a couple of feet of me.

Q. What was the defendant's initial – did he respond right away in the presence of Officer Marc Reider?

A. Yes. Yes, he did, on the last question on the card, there was some problem with Officer Reider being there.

Q. What was the last question?

A. The last question, understanding these rights and having them in mind, do you wish to give up these rights and talk to me now?

Q. What, if anything occurred, after you asked that question?

A. Well, at first, the defendant didn't respond at all and I asked him if he understood, and just about at that point in time, Officer Reider turned and walked towards his patrol car and the defendant stated to me, I will talk to you, but I'm not going to talk to him, referring to Officer Reider as him.

Waggoner received his *Miranda* warnings again at the beginning of the videotaping. The relevant portion of those warnings proceeded as follows:

PATROLMAN NERI: You have the right to talk to a lawyer before answering any questions and have a lawyer with you before and during questioning. Do you understand this?

WAGGONER: Yes.

PATROLMAN NERI: If you cannot afford a lawyer, you have the right to have a free lawyer appointed for you before any questions are asked and during any questioning. This free lawyer is at no expense or cost to you. Do you understand this?

WAGGONER: I can't afford a lawyer.

PATROLMAN NERI: During questioning, you may stop at any time and refuse to answer any further questions. Do you understand that?

WAGGONER: Yes, I do.

PATROLMAN NERI: Understanding these rights and having them in mind, do you wish to give up these rights and talk to me now?

WAGGONER: About what?

PATROLMAN NERI: Well there will be some question I have here. If you wish to answer them you may, and if you don't you just refuse to answer them and that's perfectly all right.

WAGGONER: Well, ask them.

PATROLMAN NERI: Okay.

WAGGONER: I may answer them I may not, it depends, as I said, it depends on what the question is.

Waggoner contends that his comment "I can't afford a lawyer" constituted an invocation of his right to counsel which barred any further custodial interrogation by the police. Moreover, Waggoner asserts that his response, "I may answer them, I may not. It depends on what the question is," to Neri's inquiry about whether he would respond to questions, was clearly the response of a wary man. Therefore, Waggoner argues, the Commonwealth should have shouldered the burden of establishing an explicit waiver of his right to counsel.

Initially, we note that had Waggoner not been rewarned of his *Miranda* rights at the beginning of the videotaping, we would be required to examine the totality of the circumstances to determine whether he should have been rewarned. *Commonwealth v. Riggins*, 451 Pa. 519, 304 A.2d 473 (1973). If our examination then revealed that his first warning was sufficient, our holding then would be that Waggoner voluntarily, knowingly, and intelligently waived his *Miranda* rights. However, the fact remains that Waggoner was given a second *Miranda* warning and during this second warning he voiced an ambiguous statement regarding his understanding of his right to counsel.

In *Edwards v. Arizona*, 451 U.S. 477 (1981) (per curiam), the Supreme Court held that an accused who has expressed his desire to deal with the police only through

counsel may not be subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication, exchanges, or conversations with the police. In *Smith v. Illinois*, 469 U.S. 91 (1984), the following exchange took place between a police officer and the appellant: "Q. You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that? A. Uh, yeah. I'd like to do that." *Id.* at 93. The Supreme Court held that this was an unambiguous invocation of the appellant's right to counsel. In so holding, the Court noted that courts have developed conflicting standards for determining the consequences of an ambiguous or equivocal assertion of the right to counsel:

> Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. Others have attempted to define a threshold clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. *See, e.g., People v. Krueger*, 82 Ill. 2d 305, 311, 412 N.E.2d 537, 540 (1980) ("[A]n assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity," but not "every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel"), *cert. denied*, 451 U.S. 1019, 101 S.Ct. 3009, 69 L.Ed. 2d 390 (1981). Still others have adopted a third approach, holding that when an accused makes an equivocal statement that "arguably" can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel.

469 U.S. at 96 n.3. However, because Smith's request for counsel was unambiguous under any of the various standards, the Supreme Court did not have to resolve the conflict between the courts. *Id.* at 93.

In *Commonwealth v. Hubble,* 509 Pa. 497, 504 A.2d 168 (plurality opinion), *cert. denied,* 106 S. Ct. 3272 (1986), the Supreme Court of Pennsylvania considered the *Smith* alternatives. The court reasoned that the first approach, in which all questioning must cease upon any mention of counsel no matter how ambiguous or equivocal, is unduly restrictive. The court then proceeded to apply the other two standards, concluding that under either of them, Hubble's ambiguous request for counsel did not trigger the *Edwards* prophylactic rule. *Id.*

In *Commonwealth v. Davis,* ___ Pa. Super. ___, 526 A.2d 1206 (1987), the appellant was given his *Miranda* warnings and gave every indication of fully understanding them. Then:

> [Appellant] said to the police that he wanted to talk about and make a statement regarding the crimes under investigation. Having said this, he was given a form on which were enumerated his rights under *Miranda*. Two questions to be answered at the bottom of the form contained a waiver proviso. To the first question, "Do you understand each of these rights I have explained to you," [appellant] answered by writing the word, "yes" and his initials thereafter. To the second question, "Having these rights in mind do you wish to talk to us now?", [appellant] wrote "no". At trial the police officers testified that they were baffled by the written "no" answer in light of [appellant's] oral statement immediately prior thereto that he wanted to make a statement regarding the crimes under investigation. As a result, they asked why he wrote "no" to the second question and [appellant]

> answered that he meant, "I don't want an attorney." After this exchange, the [appellant] wrote the word "yes" to this second question and his initials thereafter in substitution of the word "no". [Appellant] then made his oral statement regarding the crimes involved in this case which the officers reduced to writing. The [appellant] signed the statement and initialed its pages.

*Id.* at ___, 526 A.2d 1208. The *Davis* court held that the questions by the police in their attempt to clarify the appellant's intent in making the two conflicting statements were appropriate and commendable. The court reasoned that by attempting to clarify the ambiguity in the appellant's responses without employing any coercive tactics, the police gave the appellant a "free and untrammeled choice of silence or speech." *Id.* at ___, 526 A.2d at 1211.

When Waggoner was given his *Miranda* warnings during the videotaping, he stated that he could not afford a lawyer. This statement constituted an ambiguous assertion of his right to counsel. The statement was directly at odds with Officer Neri's explanation to Waggoner that if he could not afford a lawyer, he could have one appointed for him free of charge. Considering Waggoner's response, one could easily draw the conclusion that Waggoner had failed to understand that he could have a free lawyer appointed for him. Moreover, Waggoner's statement would seem to indicate that if he could have afforded a lawyer, he would have wanted one present. Waggoner's ambiguous response prevents one from stating with unswerving confidence that he fully understood he had the right to have a lawyer appointed for him at no cost and that he waived that right.

Officer Neri responded to Waggoner's inconsistent reply by continuing with the *Miranda* colloquy. Unlike the officers in *Davis*, Officer Neri never attempted to clarify whether Waggoner had understood his right to have counsel free of charge. The fact that Waggoner ultimately decided that he might answer Neri's questions depending on what the question was did not obviate the need to establish that he had understood and waived his right to counsel. In cases such as this, when a defendant's statement regarding his *Miranda* rights is ambiguous and inconsistent with an officer's explanation of those rights, the officer should ask questions to clarify what the defendant meant by his statement or why he made it. Simply ignoring the fact that the statement was made will not suffice. A defendant's waiver of his *Miranda* rights is valid only if made voluntarily, knowingly, and intelligently. *Miranda v. Arizona, supra.* In light of the ambiguity in the appellant's statement, we cannot state with a sufficient degree of certainty that he understood and waived his *Miranda* rights. The burden of proving by a preponderance of evidence that a waiver of a constitutional right was knowing, voluntary, and itelligent rests upon the Commonwealth. *Commonwealth v. Hughes,* 477 Pa. 180, 186, 383 A.2d 882, 885 (1978). Based on the foregoing, we cannot find that the Commonwealth met this burden. The audio portion of the videotape, therefore, should have been suppressed.

In summary, the visual portion of the videotape wherein Waggoner performed the physical acts of the field sobriety test was properly admitted into evidence. However, the audio portion of the videotape violated Waggoner's right to counsel as provided by the fifth and

sixth amendments and, consequently, should have been suppressed.

Based on the foregoing discussion, the judgment of sentence entered in the Court of Common Pleas of Chester County is reversed and this case is remanded for a new trial. Jurisdiction is relinquished.

---

## APPENDIX C

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | IN THE COURT OF COMMON PLEAS |
| | : | |
| | : | CHESTER COUNTY, |
| vs. | : | PENNSYLVANIA |
| | : | NO. 2070-86 |
| RICHARD WAGGONER | : | CRIMINAL ACTION |

*OPINION*

This is an appeal, principally challenging our suppression ruling made pre-trial. We then fully adjudicated those questions from the bench, under the provisions and mandate of Pa. R. Crim. P. 323(i). That oral opinion may be found at pages 20 through 27 of the January 20, 1987 transcript, and the attention of the Superior Court we respectfully invite thereto.

Before sending the record on, however, there are two issues which bear some further discussion. First, there is the question of what constitutes testimonial evidence. In this case, there was considerable conversation between the defendant and the police officer, preserved through the modern wonders and color of video-tape, with concurrent soundtrack. The vast, almost total, bulk of its verbal contents had nothing to do with the substantive merits of the case. Rather, mention was made of personal data, such as the defendant's date of birth, driver's license number, and information of that ilk. In responding to such questioning, the defendant demonstrated the proverbial thick tongue, a certain lack of lingual and oral coordination, tending to suggest the ingestion of inebriates. This evidence I held to be non-communicative, but rather, demonstrative or physical evidence, relevant as

circumstantial evidence of inebriety: Citing *U.S. v. Wade*, 388 U.S. 218, noting that in *Wade*, the requiring of the defendant in a lineup to say the words, allegedly uttered by the robber, "put the money in the bag", a majority of the Court, in an opinion authored by Mr. Justice Brennan, concluded that "compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt." *Wade*, 388 U.S. at 222-23. The distinction appears to be "compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." *Wade*, at 222. As noted in *Wade*, this claim was forcefully rejected by Mr. Justice Holmes, calling it "an extravagant extension of the Fifth Amendment", and stating for the Court: "[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Hall* [sic] *v. U.S.*, 218 U.S. 245, at 252-253.

In the familiar case of *Schmerber v. California*, 384 U.S. 757, 764, 16 L. Ed. 2d 908, 916, 86 S. Ct. 1826, (1966), the Supreme Court, also speaking through Justice Brennan, wrestled with the question of what is communicative, or testimonial. "The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony", but that compulsion which makes a suspect or accused the source of "real or physical evidence does not violate it." The court specifically addressed the issue yet further:

> A dissent suggests that the report of the blood test was "testimonial" or "communicative", because the test was performed in order to obtain the testimony of others, communicating to the jury facts about petitioner's condition. Of course, all evidence received in court is "testimonial" or "communicative" if these words are thus used. But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or head-shake is as much a "testimonial" or "communicative" act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts noncommunicative in nature as to the person asserting the privilege, even though, as here, such acts are compelled to obtain the testimony of others.
>
> 304 U.S. at 761, 16 L. Ed. 2d at 914; fn. 5.

So also, in *United States v. Dionisio*, 410 U.S. 1, 7 (1973), the Court rejected any contention that the compelled production of a voice exemplar violated the constitutional privilege against self-incrimination. "The voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial context of what was said."

I mention all this because of a recent 2-1 panel decision of our Superior Court, decided after I decided this case, and after this appeal was lodged: *Com. v. Bruder*, 02176, Philadelphia 1986 (J. 01010/87), filed May 30, 1987. There, the Court considered two types of tests and whether they were "physical" or "testimonial", in the latter event, requiring *Miranda*[1] warnings, and seemed to extend the Fifth Amendment beyond the scope of the cases just mentioned:

---

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

> It is settled in Pennsylvania that "[r]equiring a driver to perform physical tests . . . does not violate the privilege against self-incrimination because the evidence procured is of a physical nature rather than testimonial, and therefore, no *Miranda* warnings are required. *Commonwealth v. Benson*, 20, 29, 421 A. 2d 383, 387 (1980).
>
> Although requiring Bruder to walk in a straight line was a physical test which need not have been preceded by *Miranda* warnings, we cannot readily reach the same conclusion regarding Bruder's recitation of the alphabet. Whereas the constitutional protection against self-incrimination which *Miranda* was designed to protect does not encompass physical evidence, it does refer to testimonial evidence. *Benson*, 280 Pa. Super. at 29, 421 A. 2d at 387. "Testimonial evidence is communicative evidence as distinguished from demonstrative or physical evidence." *Commonwealth v. Fernandez*, 333 Pa. Super. 279, 284, 482 A. 2d 567, 569 (1984).
>
> *We view the recitation of the alphabet as essentially communicative in nature.* Therefore, because the recitation was elicited before Bruder received his *Miranda* warnings, it should have been excluded as evidence. *Benson*, 280 Pa. Super. at 29, 421 A. 2d at 387 (citing *United States v. Wade*, 388 U.S. 218 (1967); *Schmerber v. California*, 384 U.S. 757 (1966). *See: Miranda*, 384 U.S. at 479.
>
> (Emphasis supplied).

Does that decision, pronounced after this court was divested of jurisdiction in this case, require me to urge reversal, on the basis of after-discovered, after-pronounced law? I think not. It is always a difficult quandary into which a trial judge is thrust upon discovering differences in holdings on issues at the various appellate

strata. Particularly is this so when an intermediate appellate court, most respectfully, takes it upon itself to opine in the face of opposite authority from a higher court.[2]

Having been divested of jurisdiction, Pa. R.A.P. 1701(a), by the time *Bruder* came forth, however, I am not confronted with that issue. Further, I understand that reargument of *Bruder* has been requested (although at this writing is not yet ruled upon). Should that be

---

[2] A classic example is *Commonwealth v. Loar*, 264 Pa. Super. 398, 399 A. 2d 1110 (1979), in which the Superior Court held that a prior inconsistent statement of a non-party was admissible not only to impeach, but as substantive evidence. In so doing, the court admittedly went against "long-standing Pennsylvania law", 399 A. 2d at 1116, propounded by our Supreme Court, and instead, noting that that rule of law was seriously questioned by four Supreme Court justices, was not the law in several other jurisdictions by judicial decision, was not the law under a statute of California, nor under the Federal Rules of Evidence; nor was it the favored approach of Professor McCormick. The ultimate reversals seeded by that no-doubt well-meaningly pronounced 'rule' of *Loar*, with well-meaning trial judges trying to follow what seemed to be the latest Pennsylvania appellate law in the area, were many. *See, e.g.: Commonwealth v. Mathews*, 314 Pa. Super. 38, 45 460 A. 2d 362, 365 (1983); *Commonwealth v. Thirkield*, 311 Pa. Super. 413, 416, 457 A. 2d 954, 956 (1983); *Commonwealth v. Brown*, 302 Pa. Super. 391, 400 n. 5, 448 A. 2d 1097, 1102 n. 5 (1982); *Commonwealth v. McGuire*, 302 Pa. Super. 226, 234, 448 A. 2d 609, 613 (1982). These reversals occurred after the Supreme Court finally got around to reafffirming the rule in *Commonwealth v. Waller*, 498 Pa. 33 n. 2, 444 A. 2d 653, 656, fn. 2 (1982) [more recently, of course, *Waller* was reversed; this was done, however, by a majority of the court which had originally stated the rule, and thus had the right to reverse it. *Commonwealth v. Brady*, 510 Pa. 123, 507 A. 2d 66 (1986)].

granted, I have reason to believe that that Court, upon re-review of the relevant precedents, will conclude that there is a substantial difference going to the heart of what constitutes the testimonial between using one's memory to rotely recite an abstract, non-incriminating concept, such as the sequence in the letters of the alphabet, as opposed to announcing the sequence of the letters of the expression "Yes, I was drunk, and, by the way, I was the driver". In the former example, any error in reciting the correct alphabetical sequence, or more precisely, in creating the linguistic sounds which occur in orally uttering that sequence of letters, is, to analogize to the classic definition of what constitutes the testimonial in the context of the hearsay rule, is not offered for proof of the matter asserted. It is merely offered as some circumstantial evidence, either of an unsuccessful mnemonic experience during elementary school, or of an alcoholically addled brain at the time of the requested recitation. On the other had, the sequence of letters, translated in spoken words, of the utterance "Yes, I was drunk . . . " is offered primarily for the proof of the matter therein asserted, for this verbal disclosure of the defendant-declarant's memory, not of some abstract, arbitrary sequence of symbols, but of the actual facts surrounding the episode in question, for which the defendant is being prosecuted. It is that which is testimonial. It was my holding at bar that the recitation of this defendant's identifying information, such as his registration number, for example, was not testimonial evidence, but was circumstantial, non-testimonial evidence. Had the inquiry as to the car's registration been made for the purpose of tending to prove the defendant's identity, permitting an

inference, as the registered owner of the offending car, that he was the operator, 42 Pa. C.S. §6143, then testimonial it would be. But when it is merely offered to show the manner of speech, the lack of muscular coordination of tongue and mouth, it is nothing more than the spoken equivalent of the straight line defendants are oft commanded to walk, heel to toe, during the administration of so-called field testing of their muscular coordination of their legs and torso, rather than of their lips and tongue. It is no more testimonial than are the utterances of a myopic patient trying to read an opthalmologist's eye test chart.

Although this precise issue has never been addressed by the appellate courts in this Commonwealth, the issue has been addressed by other states. In *State v. Bottomley*, 208 N.J. Super. 82, 504 A. 2d 1223 (Law Div. 1984), *aff'd.*, 209 N.J. Super. 23, 506 A. 2d 1237 (App. Div. 1986), it was held that a defendant's manner of speech, gestures, and general demeanor, all of which show the physical manifestations of intoxication, are not testimonial evidence giving rise to a claim of compelled self-incrimination. Other cases from around this country follow a similar analysis. *See, generally: State v. Hafer*, 110 Wis. 2d 381, 328 N.W. 2d 894 (1982); *State v. Finley*, 173 Mont. 162, 566 P. 2d 1119 (1977); *Piqua v. Hinger*, 15 Ohio St. 2d 110, 238 N.E. 2d 766, *cert. denied*, 393 U.S. 1001 (1968).

I would not belabor this issue at such great length, were it not for the position to which two of our Superior Court judges have subscribed in *Bruder*. In any event, that is why I ruled as I did, and why I continue to believe that my ruling was correct.

The second issue yet being pressed is the propriety of the use of the videotape, and the defendant's suggestion that counsel should have been present at the time the video camera was turned on his client, and that failure to have him there was a fundamental breach of the defendant's Sixth Amendment right to counsel, the defendant averring that this was "a critical stage.". The general issue of the propriety of making a moving pictorial record of an occurrence, and then playing that recording back in a court of law, was first treated in this Commonwealth by no less a judicial personage that Judge Robert S. Gawthrop, in *Commonwealth v. Roller,* 100 Pa. Super. 125 (1930). There, the defendant took it upon himself to confess to the police, with his confession taken and recorded by a talking motion picture machine. The Court affirmed the admission of the motion picture confession, noting that "the movietone is, in the language of the court below 'in basic characteristics, no different, on the one hand, from ordinary photography, in regard to the visual picture produced, and, on the other hand, from phonographic records, in regard to the auditory recording of sound. The principles that underly their admissibility into evidence, therefore, differ in no way from those governing the admissibiity of still pictures and phonographic records.' " *Roller,* 100 Pa. Super. at 127. It is true that Commonwealth in *Roller* offered a wealth of expert testimony to elaborate upon the wonders of the new movietone process. That was not done at bar; but, the videotape has received substantial appellate judicial *imprimatur* in this jurisdiction. *See, e.g.;* Pa. R.C.P. No. 4017.1, permitting videotape depositions. Although there are, of course, many ways that one could distort an

ordinary photograph taken with an orthodox camera, there is no requirement that the actual photographer be present for the pictures to be admissible. *Taylor v. Modena Borough*, 370 Pa. 100, 102, 87 A. 2d 195, 196[3] (1952); *Com. v. White*, 160 Pa. Super. 522, 525. All that is required is that the picture, and its concomitant sound recording, *Com. v. Bolish*, 381 Pa. 500, 113 A. 2d 464 (1955), fairly and accurately describe or depict evidence in the case. That was established at bar, and the evidence was thus permitted.

As for the Sixth Amendment concerns of the defendant with his sought analogy to *U.S. v. Wade, supra*, requiring defense counsel to be present at defendant's lineup, the reason for the *Wade* rule is different from the situation at bar. There, the Court sought to insure that lineups were conducted in a fair manner. This included not only having a fair selection of reasonably similarly-appearing people in a lineup, but also assuring that there were no surreptitious, whispered hints to eye-witnesses as to which number, which person, to pick. Counsel are to be present as a safeguard to insure that fair and proper procedures were followed at that crucial moment of identification. "The determination whether the hearing is a critical stage requiring the provision of counsel depends, as noted, upon an analysis "whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that

---

[3] Chief Justice Agnew once observed: "The rules of evidence are the same in criminal and civil cases when they pertain to questions which must be the same in their nature." *Brown v. Schock*, 77 Pa. 471, 477 (1875).

prejudice." *United States v. Wade, supra,* at 227, 18 L. Ed. 2d at 1157.

The presence of the working video camera did not elevate these proceedings to a "critical stage", as that term of art has been defined. In the context, however, of protecting a defendant, shortly to be charged for Driving Under the Influence, if anything, the camera itself provides protection, not only for the police, but equally for the defendant. It is not unreasonable to suppose, with all respect to our esteemed constabulary, that upon occasion a police office might have exaggerated somewhat the observations of an erring defendant as he allegedly miserably flunked all the field tests to which he was submitted at the police station. If in fact his transgressions were only slight or even less so, the accurately recorded visual and auditory evidence of exactly what he did, be that evidence damning or exculpatory, is preserved with precision, a permanent picture, which is not only worth many thousands of words, but which is immutably accurate.

There was no error, let alone abuse of discretion, in admitting the videotape. On the contrary, its admission was an eminently proper exercise of this Court's discretion.

For the foregoing reasons, *inter alia,* the defendant's posttrial motions were denied.

BY THE COURT:

/s/ Robert S. Gawthrop, III

Dated: 9, June 1987

Certified From The Record

This 10 Day of June 1987
/s/ Helen Olseski
Deputy Clerk of Common Pleas Court

Counsel:

Cynthia Vickers Wilson, Esquire
Attorney for the Commonwealth

John Stanzione, Esquire
Attorney for Defendant

---

## APPENDIX D

Findings of fact and conclusions of law of the suppression judge, the Honorable Robert S. Gawthrop, III, of the Court of Common Pleas of Chester County, Pennsylvania

* * *

(p. 24) THE COURT: Very well. The Supreme Court requires me under the provisions of Pennsylvania Rule of Criminal Procedure 323(i) to adjudicate this matter with a full panoply of factual findings, discussion and conclusions of law, and I undertake that task at this juncture.

On July 24, 1986, this defendant was taken into custody, given his Miranda warnings and taken (p. 25) to – offered a blood test to which he replied he was not going to submit to a blood test. At one point off the videotape, he stated, sua sponte, that he had had a drinking problem for the past twenty years, whereupon, Officer Patrolman Neri said words to the effect that "how could that be," or "that seems unlikely, because you look too young to have been drinking for twenty years," to which the defendant replied, "Well, it was due to the preservative quality of the alcohol."

Defendant was twice given the Miranda warnings on the evening in question and the second time he was given them, which is preserved for posterity and review by this Court and any appellate courts, should it come to that.

The defendant in response to the question as to having the right to counsel and free counsel, free lawyer, if he could not afford one said, "I can't afford a lawyer,"

and at the end of the Miranda colloquy, the second Miranda colloquy, was asked if he would – was asked if he would answer any questions, to which the defendant replied, "Well, ask them," this being again immortalized on the video. Whereupon, certain questioning was made (p. 26) of him, much of which was biographical, and he was asked one question which was more than biographical but, which was: "Have your been drinking alcoholic beverages last night or today?" And there was considerable colloquy as to whether last night was before or after midnight, which is arguably demonstrable of a clear intellect.

He was asked whether he was intoxicated and he said no. He spoke at some length about his hip having arthritis, making it difficult for him to partake of the [heal]-to-toe test, and as mentioned, a videotape was made of that which transpired at Tredyffrin Police Station.

With respect to the various arguments propounded by counsel, I address them. I first address the question of whether the Miranda warnings were properly given. The first Miranda warnings were properly given, and I note as well that what the defendant said with respect to his having had a drinking problem for the past twenty years was volunterred, and, therefore, even if it had not been properly given, was not proscribed by any alleged Miranda violation. Under a legion of cases, not being excludible under that general doctrine of (p. 27) Miranda versus Arizona at 384 U.S. 436. Thereafter, when Officer Neri responded as to how the defendant didn't look as he if could have been drinking for twenty years because he didn't look that old, defendant said – the defendant stated that it was due to the preservative quality of

alcohol, a clever retort if there ever was one – and, parenthetically, was not constitutionally prohibited on two bases: One, the invocation or the exercise in the giving Miranda warnings, the first Miranda warnings was constitutionally proper. Beyond that, under the leading case of Rhode Island versus Innis at 446 U.S. 29, 100 Supreme Court 1682 at page 1691, 64 Lawyer's Ed. 2d. 297 (1980), the Supreme Court defines interrogation as encompassing a practice which police should know is reasonably likely to elicit an incriminating response. I do not construe the offhand comment of Officer Neri as being anything which would fall within that definition of interrogation. It was simply casual conversation. It was not interrogation of any sense of the word and that the defendant saw fit to wax jocular under those circumstances is not amenable to suppression under the Miranda doctrine.

(p. 28) With respect to the Miranda warnings that were given on videotape and the defendant's response that "I can't afford a lawyer," that conceivably might be excludable under the bright line test enunciated in Edwards versus Arizona 451 U.S. 47, 71 Supreme Court 1880, 68 Lawyer's Ed. 2d 378 (1981), but that case involved a defendant who had expressly asked for a lawyer in no uncertain terms. There was no such expression in this case and indeed the very ambiguity in response, in the view of the Court, causes this case to fall within the language of Commonwealth versus [Hubble], a Supreme Court of Pennsylvania case to be found at 504 A2d. 168, (1986), in which Mr. Justice Larsen, announcing the judgment of the Court, cited the Smith versus Illinois decision at 105 Supreme Court 492, at pages 492 and 493,

and noted that, first, the courts must determine whether the accused actually invoked his right to counsel. In this case, any invocation of counsel was ambiguous in the extreme, and in the view of the Court, this case falls within the [Hubble] Doctrine and indeed is not, in fact, a request for counsel. It was merely an observation that he can't afford a lawyer.

(p. 29) This defendant was articulate to the point of glibness on the night in question, and all he had to do was say: I want a lawyer, or I don't want to talk to you until I have a lawyer. He made a casual offhand remark as to his penury, but that is all. As such, we do not find that to be a genuine invocation, expression of desire to have counsel, particularly in light of his response there.

Furthermore, when considering the statements of the defendant on the night in question, one observes that the content of the statements themselves is not incriminating. Indeed, much of the language, much of the verbiage, the product of his mind such as is considered in the distinction between testimonial and essentially demonstrative evidence found in the fascinating case of Schmerber versus California 384 U.S. 757, 86 Super. Court 1826, 16 Lawyer's Ed. 2d 908 (1966), we observe that it is not the utterances themselves, such as, "are you intoxicated?", and he said "no" – and he talked at great lengths about having arthritic problems with his hip, all of which, if anything, tends to exculpate him; rather it is the manner in which he spoke.

(p. 30) It is the arguable slurring of the speech, the arguable – just the, if you will, the demeanor of his tongue and the lack of judgment or the – just his – the

way he controlled the articulation of his mouth and just his general comportment, which is incriminating. As such, it seems analogous to indeed the language in the case urged upon us by the defense. I refer of course to the leading case of United States versus Wade. And one observes that in Wade, the Supreme Court held expressly in Wade at 388 U.S. 218, 18 Lawyer's Ed. 2d. 114, 987 [sic] Supreme Court 1926 that it was entirely proper to have the individual in the lineup say, "put the money in the bag," which were the words uttered by the robbers allegedly in question. As such, it was not testimonial for the witness to say that. He was not being compelled to testify against himself – that is to say the person in the lineup – to say that. It was not of a testimonial, communicative nature. It was merely identifying a physical characteristic. In this case, the utterance of the words was not testimonial in that he was not talking about what happened on the occasion but simply the manner of his coordination of his mouth and the way (p. 31) he spewed the words forth was circumstantial evidence of the physical characteristic of how much alcohol that infiltrated the corpuscles of his brain, and as such, we deem it to fall within that language of United States versus Wade, iterating the now oft cited fact that merely to state a word or words in such a context is not testimonial.

The argument that the defendant should have a right to counsel at the lineup (sic.)* is specious. One observes that the purpose of having a right to counsel at the lineup is for the – the purpose of requiring the presence of counsel at a lineup is a recognition by the high court that

---

(*The Court here intended to use the word "videotaping," but misquoted.)

there has been a degree of suggestion inherent in the manner in which the prosecution presents its suspect to witnesses for pretrial identification. A commentator has observed that "The influence of improper suggestion upon identifying witnesses properly accounts for more miscarriages of justice than any other single factor," and the Court goes on to observe, "It is a matter of common experience that once the witness has picked the accused at the (p. 32) lineup, he is not likely to go back on his word later on. So that in practice, the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined then and there, before trial." United States versus Wade, 388 U.S. 218, 87 Supreme Court 1926 at page 1933, 818 [sic] Lawyer's Ed. 1149 [sic] (1967). Thus, we observe that the mischief to be remedied and foreclosed in the Wade case is the highly relevant one of prohibiting a situation where a district attorney or a police officer as some unscrupulous such people – and there are some, we admit – recognize might do and nudge a witness into saying "how about number four there, doesn't he look like the person," words to that effect. And indeed having personally attended a number of lineups over my own career as a trial lawyer, I know that where the defense lawyer is situated during such lineup is not on the side of the one way mirror, if that be used, where the people in the lineup are, but rather right next to that witness to make sure there is no hinting or suggesting made to that witness. That is a very real concern and it is something that would not be protected by any record and really the lawyer (p. 33) is there as a witness to testify whether there has been any suggestive situation.

Rather in this situation, that is not the problem because, as mentioned, what the witness identifies at the lineup would be admissible at trial indeed as an exception of the Hearsay Rule. See Commonwealth versus Saunders, 386 Pa. 149, 125 A.2d 442, and other cases along that line of exception of the Hearsay Rule. What this videotape does actually is it protects the defendant. It protects the defendant from – and again, I am accusing nobody, but should there be a tendency on a police officer to perhaps exaggerate at a later time and describe the aberrations of the defendant's feet from the line in which he is walking heel to toe as being greater than they were, any such tendency is squelched by the best evidence unimpeachable evidence, of the videotape, which preserves any such physical aberrations for all times, and, most importantly, for the jury, and, thus, it is a very different circumstance.

Counsel concedes that in the cases he cited to the Court, they all pertain to photo lineups or to linesups [sic] except for the Richardson (p. 34) case, which was at 249 A2d. 307, in which I am inclined to confine to its own facts of the reenactment of a crime. The defendant wasn't asked to go out in a car and drive, but there is no law whatsoever saying that there is a right to counsel at such test. There is, however, a wealth of law to the effect that one does not have a right to counsel at the time of taking a test. I am thinking more in the chemical test context. The Commonwealth Court, through a legion of decisions – see for example Weitzel's Appeal 41 Commonwealth Court 235, 400 A2d. 1979 [sic], Herbert versus Commonwealth 75 Commonwealth Court 28, 460 A2d. 920 (1983) – says the operator has no right to have an attorney present

or to call an attorney before deciding whether or not to take a test. That applies for a blood test and that applies for physical test as well, the reason for that being obviously it would thwart the legitimate purposes of the police in trying to nail down the evidence in the case because as noted in Schmerber versus California affordsaid [sic], the presence of inebriant intoxicants in the blood is an ephemeral phenomenon. And if the defendant be permitted to track down a lawyer, which we all know can take (p. 35) time, particularly in the wee hours such as this one, he could effectively forestall taking the defendant until the defendant was sober as a proverbial choirboy. Thus, there is no evidence – no law whatsoever supportive of the defendant's argument that he should have a right to counsel. Indeed, there is a lot of law saying that he does not have such a right.

For the foregoing reasons, we find the defendant's motion to suppress to be without merit and we deny the same.

One other brief mention I want to say before closing the record in this context is when the defendant said he was not going to submit to a blood test, the question leading up to that was not precluded as well because he was not asking for something testimonial and also it was protected by the Miranda warnings. The motion to suppress shall be and hereby is denied.

(Whereupon, the suppression hearing in the above-entitled matter was concluded.)

---

## APPENDIX E

IN THE COURT OF COMMON PLEAS
IN THE COUNTY OF CHESTER, PENNSYLVANIA

| | |
|---|---|
| COMMONWEALTH OF PENNSYLVANIA | ) |
| VS. | ) |
| RICHARD WAGGONER | ) |

The videotaping of Richard G. Waggoner, conducted at the Tredyffrin Township Police Department by Officer Lester J. Neri on July 24, 1986.

(p.1) P R O C E E D I N G S

(Time superimposed on screen 2:44 A.M.)

OFFICER REIDER: I'm Officer Marc A. Reider of the Tredyffrin Township Police Department, Chester, County, Pennsylvania. Today is Thursday, the 24th of July, 1986. The time is 0254 hours. I will be (p. 2) operating the video camera during the testing of Mr. Richard G. Waggoner, who has been arrested for driving under the influence of alcohol or controlled substances by Officer Lester J. Neri.

Officer Neri and the defendant, Mr. Waggoner, will now enter the room.

OFFICER NERI: Okay, Mr. Waggoner, you can just stand right there please.

THE DEFENDANT: Where?

OFFICER NERI: Just right here.

THE DEFENDANT: Right here?

OFFICER NERI: Yeah, that's good.

Pursuant to law, I'm informing–I'm going to read you your Miranda Warnings, like I did out on the street, from this blue card.

THE DEFENDANT: Right.

OFFICER NERI: Pursuant to law, I'm informing you I'm Lester J. Neri of the Tredyffrin Township Police Department. I'm investigating you for driving under the influence of alcohol or a controlled substance. You have the right to remain silent, however, if you say anything such can and will be used against you in a court of law. Do you understand that?

THE DEFENDANT: Yes.

(p. 3) OFFICER NERI: You have the right to talk to a lawyer before answering any questions, and have a lawyer with you before and during questioning. Do you understand this?

THE DEFENDANT: Yes.

OFFICER NERI: If you cannot afford a lawyer, you have the right to have a free lawyer appointed for you before any questions are asked and during any questioning. This free lawyer is at no expense or cost to you. Do you understand this?

THE DEFENDANT: I can't afford a lawyer.

OFFICER NERI: All right. During questioning you may stop at any time and refuse to answer any further questions. Do you understand that?

THE DEFENDANT: Yes, I do.

OFFICER NERI: Understanding these rights and having them in mind, do you wish to give up these rights and talk to me now?

THE DEFENDANT: About what?

OFFICER NERI: Well, there will be some questions I have here. If you wish to answer them, you may, and if you don't, you can just refuse to answer them, and that's perfectly all right.

THE DEFENDANT: Well ask them,

OFFICER NERI: Okay.

THE DEFENDANT: Now, I may answer them; I (p. 4) may not.

OFFICER NERI: That's fine.

THE DEFENDANT: It depends. As I said, it depends on what the question is; okay?

OFFICER NERI: That's okay.

THE DEFENDANT: All right.

OFFICER NERI: Before I get to these questions, Rich, I'm going to ask you to do the same tests that we did out on the street. The one where I waved the pen in front of your eyes. I asked you to follow the pen.

THE DEFENDANT: Right.

OFFICER NERI: Okay. And walking and turning with one leg stand. So, if you just accompany me up here to where this block is and just put your two front feet right in front of it and face straight ahead at the camera.

THE DEFENDANT: This way or that way?

OFFICER NERI: Face straight ahead. Put your two feet right here. Right where my foot is.

THE DEFENDANT: What?

OFFICER NERI: That's it; you got it.

THE DEFENDANT: Right here?

OFFICER NERI: Yes, sir.

THE DEFENDANT: Okay.

OFFICER NERI: Okay. Now, I'm going to (p. 5) check your eyes. What I need you to do is place your feet together and stand up straight, keep your arms at your side. Uh, are your wearing contact lenses?

THE DEFENDANT: No.

OFFICER NERI: Now, what I want you to do is focus–

THE DEFENDANT: The hands what–at the side?

OFFICER NERI: Just relax at your side.

THE DEFENDANT: Okay.

OFFICER NERI: Okay. I want you to focus on the tip of the pen with your eyes. Keep your head still.

THE DEFENDANT: Bottom or top?

OFFICER NERI: Top. Keep your head still. Follow the object with your eyes as I move it in front of you. Do not move your head. Do you understand that, Rich?

THE DEFENDANT: I think so.

OFFICER NERI: Okay.

(Officer Neri is now moving the pen from side to side before the defendant's eyes.)

THE DEFENDANT: Is this put on tape?

OFFICER NERI: Yes. It's all being videotaped, just as I told you outside.

THE DEFENDANT: Huh. You said, don't (p. 6) move my head?

OFFICER NERI: Right.

THE DEFENDANT: All right.

(Officer Neri continues to move the pen from side to side before the defendant's eyes.)

OFFICER NERI: Okay. We're going to go down the right here.

THE DEFENDANT: It makes you kind of dizzy.

OFFICER NERI: Yeah.

THE DEFENDANT: Whew.

OFFICER NERI: All the way back to the wall. The red line that's against the wall.

THE DEFENDANT: Do I have to keep my feet together?

OFFICER NERI: No, you can waik –

THE DEFENDANT: Can I kind of–whew.

OFFICER NERI: Sure. Just walk back here.

THE DEFENDANT: How did I do?

OFFICER NERI: You did the same as you did out on the street.

THE DEFENDANT: Ah.

OFFICER NERI: Turn around and face forward.

THE DEFENDANT: Over here or over here?

OFFICER NERI: Face forward towards the camera, the videotape camera there.

(p. 7) THE DEFENDANT: Which ways forward?

OFFICER NERI: Just like that. Just like you're standing is fine.

THE DEFENDANT: Where?

OFFICER NERI: Right there. I'm going to check your balance.

THE DEFENDANT: Okay.

OFFICER NERI: What I need you to do is place your left foot–your left foot on the line.

THE DEFENDANT: Wait. Okay.

OFFICER NERI: That's it, place your right foot on the line directly –

THE DEFENDANT: No, wait. Wait. You said right foot?

OFFICER NERI: First, you place your left foot on the line.

THE DEFENDANT: Oh.

OFFICER NERI: Now, place your right foot on the line directly in front of your left foot.

THE DEFENDANT: And then do what; walk?

OFFICER NERI: Well, I'll finish giving you instructions. Just like that. And keep your hands at your side.

THE DEFENDANT: All right. But hurry up.

(p. 8) OFFICER NERI: Okay.

THE DEFENDANT: And what's the instructions?

OFFICER NERI: Well, you got to stay in that position until I finish giving you instructions.

THE DEFENDANT: Oh, really.

OFFICER NERI: One foot in front of the other; hands at your side.

THE DEFENDANT: Okay. All right. So left foot –

OFFICER NERI: Left foot on the line.

THE DEFENDANT: And then right foot?

OFFICER NERI: That's it. Just stand like that until I finish giving you instructions.

THE DEFENDANT: Oh, come on. You try it. That's hard.

OFFICER NERI: Okay. Well, I'm standing in that position right now, Rich.

THE DEFENDANT: My left –

OFFICER NERI: Okay.

THE DEFENDANT: All right.

OFFICER NERI: When I tell you to, take nine heel to toe steps on the line, keeping your feet on the line.

THE DEFENDANT: Nine?

OFFICER NERI: When I tell you to, but (p. 9) what you got to do is put the heel of one toe against the–or the heel of one foot against the toe of the other. Your feet are spread there. Back the heel right up to your toe. Just like this.

THE DEFENDANT: I did it. All right.

OFFICER NERI: That's it.

(The defendant moves off the line.)

THE DEFENDANT: Shoot.

OFFICER NERI: Okay. When I tell you to, take nine heel to toe steps on the line, keeping your feet on the line. When you get to your ninth step, pivot on your lead foot, keeping your lead foot on the line, taking several small steps around your foot, your lead foot. Take nine more heel to toe steps back to the starting point. I'll explain all that to you. I'll demonstrate it for you. Okay?

THE DEFENDANT: This is rough.

OFFICER NERI: Your left foot on the line.

THE DEFENDANT: This is really rough for anybody. My God.

OFFICER NERI: Your right foot's in front of your left foot.

THE DEFENDANT: All right. After we do what you said–all right. I could–I can do the walking, but just standing here for–for how many minutes? Does (p. 10) it say you have to do that?

OFFICER NERI: It's–you have to stand where I give the instructions.

THE DEFENDANT: Where? Where does it say you have to stand there that many minutes?

OFFICER NERI: See, right here.

THE DEFENDANT: Where?

OFFICER NERI: See this right here. Stay in that position until I finish giving the instructions. This is word for word what I did to you out on the street.

THE DEFENDANT: All right. Which I did–oh, well, I was better on the street than I was here–stay in that position for –

OFFICER NERI: Okay. Well, here–give me–are you gonna do the test?

THE DEFENDANT: No, no, no–yes, but I just want to read this. Stay in that position until I finish giving you instructions. All right. It doesn't say how long.

OFFICER NERI: Right. Now, I'm going to give you instructions. I'm going to demonstrate what I want you to do –

THE DEFENDANT: And then it says, do you understand. Yes, I understand, but my God, you're reading all that.

(p. 11) OFFICER NERI: Okay. Here's what I want you to do, all right?

THE DEFENDANT: I can do this.

OFFICER NERI: Put your left foot on the line, put your right foot down, walk and count nine steps, one, two, three. When you get to nine, stop, turn very slowly, pivoting like this, real small steps. Okay?

THE DEFENDANT: Uh-huh.

OFFICER NERI: And then walk back nine steps counting out loud.

THE DEFENDANT: All right, left on the back –

OFFICER NERI: Begin.

(Defendant begins walking and leans over on adjacent desk.)

THE DEFENDANT: Hmm. Screwed up.

OFFICER NERI: Well, go ahead. You can continue. You were on number three.

THE DEFENDANT: Three.

(The defendant resumes walking.)

THE DEFENDANT: Well, it was better coming back. I think I could, I think I could do it better the second time. Do you get practice?

OFFICER NERI: No. I got, I got one more thing for you to do. The easy one out on the street, when I told you to look at your foot. Again, this is a balance (p. 12) test. We're gonna check your balance.

THE DEFENDANT: I never said–no, go ahead. Go ahead.

OFFICER NERI: Place your feet together; stand up straight; keep your arms at your side. Stay in that position until I finish giving you instructions. Do you understand?

THE DEFENDANT: (Nods.)

OFFICER NERI: When I tell you to, raise one leg, either leg, directly out in front of you, approximately six inches from the ground. Like this. When I tell you to, keep the leg raised for 30 seconds, counting to 30, like this; one-one thousand, two-one thousand, three-one thousand, four-one thousand.

THE DEFENDANT: For 30 seconds?

OFFICER NERI: Right. Count to 30 by thousands. Do you understand that part?

THE DEFENDANT: Is this supposed to be for cripples?

OFFICER NERI: This is for anybody that's going to be doing the test.

THE DEFENDANT: Is this for cripples with arthritis in their hip?

OFFICER NERI: If someone was medically unable to do the test, it wouldn't be for them.

(p. 13) THE DEFENDANT: Well, I'm–

OFFICER NERI: You mean somebody in a wheelchair?

THE DEFENDANT: I have arthritis in my right hip, so how am I going to do that? I'll try.

OFFICER NERI: Okay.

THE DEFENDANT: I'll try.

OFFICER NERI: All right. While you're doing the test, I want you to watch your foot. Keep your arms at your side; count out loud and don't stop until the test is completed. Just this: one-one thousant, two-one thousand, three-one thousand, looking at your foot counting to 30 by thousands. Pick whatever leg you're most comfortable with.

THE DEFENDANT: I wouldn't be able to hold it up for a count of 30. Not with my arthritis. Sorry.

OFFICER NERI: Okay, you don't want to do this, this one.

THE DEFENDANT: I'll try it, but I don't think I can.

OFFICER NERI: Okay.

THE DEFENDANT: All right. Look man, I got arthritis in my hip and in my knee–in my right. And I can't put weight on it, so that'll have to be the one I'm gonna lift up. So, I'll try it.

(p. 14) OFFICER NERI: All right. Go ahead.

THE DEFENDANT: What, do I do it out–

OFFICER NERI: Out loud.

THE DEFENDANT: Out loud?

OFFICER NERI: Yes.

THE DEFENDANT: One, two, three, four, five – it hurts. I can't, but wait. Hold on. Wait, maybe I can. Damn, it hurts.

OFFICER NERI: If any of this is causing you any discomfort, I don't want you to try and do it. I don't want you to injure yourself in any way.

THE DEFENDANT: No, no, It won't injure me any more than I already am. If I can get balance. If I only had my sneakers on, for God's sake, I could do this. One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve – whoa – thirteen.

(The defendant begins hopping on one foot.)

THE DEFENDANT: Fourteen, fifteen – does that – is it okay if I – sixteen. I haven't put it down yet – seventeen. Whoa, that hurts – eighteen, ninteen, twenty, twenty-one, twenty-two. Oh, God that hurts.

OFFICER NERI: Why don't you just –

THE DEFENDANT: Wait – twenty-four, twenty-five, twenty-six – whoa – twenty-seven, twenty-eight. Oh, God I'm not going to fall over – thirty. All right. (p. 15)

All right. All right. I almost did it. I got to twenty-eight. All right.

OFFICER NERI: Pretty good.

THE DEFENDANT: All right. Look, I'm sorry I hopped, but man, I didn't touch with that other foot until twenty-eight. So, what do we do now?

(The defendant and Officer Neri take seats at desk.)

OFFICER NERI: Now, I'm into the questioning part.

THE DEFENDANT: Oh, no, not a test. You want me to type this out as you read it?

OFFICER NERI: No, that's okay. That's not a typewriter.

THE DEFENDANT: Yeah, I know. Well, I do teletype – computer oriented.

OFFICER NERI: Were you operating a vehicle tonight, Mr. Waggoner?

THE DEFENDANT: Yes.

OFFICER NERI: Where were you going?

THE DEFENDANT: To my friend's apartment. I had the address. Yeah – I said, could I look it up, and you never let me look it up.

OFFICER NERI: Where were you coming from Mr. Waggoner?

THE DEFENDANT: From, uh, Broomall. Yeah, (p. 16) I was going to – uh, oh God, lets see. Well, it was on Route 30.

OFFICER NERI: What time did you leave Broomall?

THE DEFENDANT: (No response.)

OFFICER NERI: Do you know what time you left Broomall Mr. Waggoner?

THE DEFENDANT: (No response.)

OFFICER NERI: What time was that?

THE DEFENDANT: About?

OFFICER NERI: Yes.

THE DEFENDANT: Roughly, about, I'd say 10:00.

OFFICER NERI: 10:00 o'clock, p.m.?

THE DEFENDANT: 10:00, 11:00. Between 10:00 and 11:00.

OFFICER NERI: Where are you now Rich?

THE DEFENDANT: I'm at the police station.

OFFICER NERI: What time is it now?

THE DEFENDANT: 3:00 in the morning. Is this formality?

OFFICER NERI: Yes. Have you been drinking alcoholic beverages?

THE DEFENDANT: When?

OFFICER NERI: Tonight.

THE DEFENDANT: Well, it's 3:00 in the (p. 17) morning; tonight when? When do you mean; last night –

OFFICER NERI: Well, have you been drinking?

THE DEFENDANT: – or today?

OFFICER NERI: Recently, have you been drinking any alcoholic beverages?

THE DEFENDANT: Last night; not today. It's 3:00 in the morning. Come on.

OFFICER NERI: Did you start drinking before 12:00, before 12:00 midnight?

THE DEFENDANT: I was going to say midnight or noon? Look – all right. Let's hurry up these things. Come on. Let's – uh.

OFFICER NERI: Were you drinking any alcoholic beverages before midnight tonight?

THE DEFENDANT: Before midnight last night?

OFFICER NERI: Three hours ago, were you drinking any –

THE DEFENDANT: Last night, yeah, yeah, but not after midnight. But not today.

OFFICER NERI: Not after midnight?

THE DEFENDANT: No.

OFFICER NERI: Before midnight?

THE DEFENDANT: Right. Yeah, I – I know this is a standard form, but my God, you know.

OFFICER NERI: What kind of an alcohol (p. 18) were you drinking?

THE DEFENDANT: What do you mean?

OFFICER NERI: Wine, beer –

THE DEFENDANT: Like wine, beer, scotch, whiskey, you know; is that what you mean?

OFFICER NERI: What kind? Not the particular brand. What kind?

THE DEFENDANT: Oh, oh, okay; white wine.

OFFICER NERI: And how much did you drink?

THE DEFENDANT: A couple glasses.

OFFICER NERI: Have you done any – have you been using any controlled substances?

THE DEFENDANT: I told you to check my wrists. My God, I don't do that stuff.

OFFICER NERI: Where were you drinking that Rich? Where were you at?

THE DEFENDANT: At my apartment. My God, I told you I'm in the middle of moving. I'm packing up boxes and boxes of stuff.

OFFICER NERI: Are you taking any medications?

THE DEFENDANT: Nope. I take, uh, vitamins.

OFFICER NERI: When did you last eat?

THE DEFENDANT: What do you mean?

OFFICER NERI: When did you last have something to eat? What time?

(p. 19) THE DEFENDANT: I had, uh, breakfast. I had lunch, and I had dinner. Uh, like 7:00 o'clock it was dinner.

OFFICER NERI: 7:00 p.m., 7:00 o'clock, p.m., right?

THE DEFENDANT: It was dinner, yeah.

OFFICER NERI: What did you eat?

THE DEFENDANT: I had steak, potatoes, green beans. For lunch I had, uh, Salami. I don't know. What, what do you want?

OFFICER NERI: That's good enough. How much sleep did you get last night?

THE DEFENDANT: I really couldn't tell you. I was packing boxes and boxes. I'm moving Friday morning, so my nerves haven't been too good. But – um –

OFFICER NERI: Are you ill or injured in any way?

THE DEFENDANT: No, no. But how would you be when you're moving, you know. So, I've been up late; really late, you know, packing boxes.

OFFICER NERI: Are you being treated by a doctor or dentist?

THE DEFENDANT: No.

OFFICER NERI: Do you have diabetes?

THE DEFENDANT: Nope. I'm so healthy (p. 20) you wouldn't believe it. A little skinny, but I'm healthy.

OFFICER NERI: Are you taking insulin?

THE DEFENDANT: No. I said, I'm healthy.

OFFICER NERI: Are you intoxicated?

THE DEFENDANT: Nope. Are you?

OFFICER NERI: No.

THE DEFENDANT: Good. You know, I was thinking just because I can't stand on that line – a lot of it has to do

with my hip. I can't like get my balance on that hip, cause I do have arthritis. In fact, pretty bad, you know, in my right hip and in my knee. So, you know, I've been limping for about five years now, and there's no cure for it. All I do is take aspirin for it. So –

OFFICER NERI: Okay Rich, that's it. You can stand up and go back out in this outer room.

THE DEFENDANT: Fine.

OFFICER NERI: There you go.

OFFICER REIDER: This will conclude the video processing of Mr. Richard Waggoner.

(Clock superimposed on screen 3:07 A.M.)

4/14, P

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,
Petitioner :

v. : NO. 88-1056 ~~88-1065~~

RICHARD WAGGONER,
Respondent :

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Richard Waggoner, asks leave to file the attached Brief in Opposition to Certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed in the Superior Court of Pennsylvania. Respondent's Affidavit in support of this motion is attached hereto.

John L. Merrick, Esquire

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA, :
Petitioner

v. : NO. 88-1065

RICHARD WAGGONER, :
Respondent

AFFIDAVIT

I, Richard Waggoner, being first duly sworn according to law, depose and say that I am the Respondent in the above-captioned case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefore; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this court are true.

1. **Are you presently employed?** No. I last worked in late 1986 at the Everyday Gourmet Shop in Newtown Square, Pa. My wages for 1986 were $2000. I have been unable to work for two years because of a physical disability. I have an artificial hip, and I am due to have further surgery to correct the degeneration of my other hip joint.

2. **Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?** Yes, my mother died 18 months ago, and I inherited stocks, bonds, and mutual fund shares. These investments pay less than $2,000 per year in interest and dividends.

3. **Do you own any cash or checking or savings account?** Yes, I own a checking account with a current balance of $1476.21.

4. **Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property?** Yes, I own stocks, bonds, and mutual fund shares worth between $25,000 and $30,000.

5. **List the persons who are dependent upon you for support and state your relationship to those persons.** I support only myself.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Richard G. Waggoner

Richard G. Waggoner,
Respondent

Subscribed and Sworn to Before
me this 23rd day of March, 1989.

Catherine E. Pierce

NOTARIAL SEAL
Catherine E. Pierce, Notary Public
West Chester, Chester County
My Commission Expires July 8, 1991

No. 88-1056

In The

Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

RICHARD WAGGONER,
Respondent.

# Brief in Opposition to Petition for Writ of Certiorari

John R. Merrick, Esquire
Public Defender of Chester
County, Pennsylvania
17 North Church Street
Courthouse Annex - Third Floor
West Chester, PA 19380
(215) 344-6940
Counsel for Respondent

## QUESTIONS PRESENTED

1. IF A CRIMINAL DEFENDANT IS SUBJECTED TO CUSTODIAL INTERROGATION DURING THE ADMINISTRATION OF VIDEOTAPED SOBRIETY TESTS, IS THE AUDIO PORTION OF THE TAPE PROTECTED BY THE FIFTH AMENDMENT?

2. DOES IS PENNSYLVANIA LAW PROVIDING THAT THE RIGHT TO COUNSEL ATTACHES AT ARREST ACCORD WITH CONSTITUTIONAL PRINCIPLES; EVEN IF VIEWED AS AFFORDING A MORE EXPANDED RIGHT TO COUNSEL THAN PROVIDED BY THE SIXTH AMENDMENT, WAS THE PENNSYLVANIA COURT'S DECISION BASED ON AN INDEPENDENT AND ADEQUATE NON-FEDERAL GROUND?

3. WHEN THE VIDEOTAPING OF A CRIMINAL DEFENDANT UNQUESTIONABLY INVOLVES CUSTODIAL INTERROGATION BY THE POLICE, IS SUCH A CRITICAL STAGE AT WHICH HE IS ENTITLED TO THE ASSISTANCE OF COUNSEL?

4. DID THE DEFENDANT WAIVE HIS MIRANDA RIGHTS ~~OR~~ HIS RIGHT TO COUNSEL?

5. IS THERE A NEED FOR A VIDEOTAPE EXCEPTION TO MIRANDA V. ARIZONA OR EDWARDS V. ARIZONA?

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF THE CASE | 1 |
| REASONS FOR DENYING THE WRIT | 3 |
| I. AS THE RESPONDENT WAS SUBJECTED TO CUSTODIAL INTERROGATION DURING THE ADMINISTRATION OF VIDEOTAPED SOBRIETY TESTS, THE AUDIO PORTION OF THE TAPE IS PROTECTED BY THE FIFTH AMENDMENT | 3 |
| II. IN ACCORDANCE WITH CONSTITUTIONAL PRINCIPLES, PENNSYLVANIA LAW PROVIDES THAT THE RIGHT TO COUNSEL ATTACHES AT ARREST; MOREOVER, EVEN IF VIEWED AS AFFORDING A MORE EXPANSIVE RIGHT TO COUNSEL THAN PROVIDED BY THE SIXTH AMENDMENT, THE SUPERIOR COURT'S DECISION WAS BASED ON AN INDEPENDENT AND ADEQUATE NON-FEDERAL GROUND | 7 |
| III. BECAUSE THE VIDEOTAPING OF THE RESPONDENT UNQUESTIONABLY INVOLVED CUSTODIAL INTERROGATION BY THE POLICE, SUCH WAS A CRITICAL STAGE AND HE WAS ENTITLED TO THE ASSISTANCE OF COUNSEL | 10 |
| IV. RESPONDENT DID NOT WAIVE HIS MIRANDA RIGHTS OR HIS RIGHT TO COUNSEL | 12 |
| V. THERE IS NO NEED FOR A VIDEOTAPE EXCEPTION TO MIRANDA V. ARIZONA OR EDWARDS V. ARIZONA | 18 |
| CONCLUSION | 19 |
| PROOF OF SERVICE | 20 |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| CONSTITUTIONS AND RULES: | |
| U.S. Const. Amendment V | passim |
| U.S. Const. Amendment VI | passim |
| Pa. Const. Art. I, §9 | 9 |
| Pa. Rule of Criminal Procedure No. 101 | 8 |
| CASES: | |
| Commonwealth v. Ferguson, 327 Pa.Super. 305, 475 A.2d 810, 813 (1984) | 9 |
| Commonwealth v. Richmond, 458 Pa. 167, 320 A.2d 351 (1974) | 7, 8 |
| Commonwealth v. Waggoner, 373 Pa.Super. 23, 540 A.2d 280 (1988) | 8, 10, 11, 17 |
| Commonwealth v. Zabala, 310 Pa.Super. 301, 456 A.2d 622, 628 (1983) | 8 |
| Doe v. United States, 487 U.S. ___, 101 L.Ed.2d 184 (1988) | 5 |
| Edwards v. Arizona, 451 U.S. 477 (1981) | 10, 18 |
| Kirby v. Illinios, 406 U.S. 682 (1972) | 7 |
| Miranda v. Arizona, 384 U.S. 436 (1966) | passim |
| Pennsylvania v. Bruder, ___ U.S. ___, ___ n.3, 102 L.Ed.2d 172, 177 n.3 (1988) | 3 |
| South Dakota v. Neville, 459 U.S. 553 (1983) | 3 |
| United States v. Gouveia, 467 U.S. 180 (1984) | 7 |

## STATEMENT OF THE CASE

On July 24, 1986, Officer Lester J. Neri of Tredyffrin Township, Chester County, Pennsylvania, arrested Richard Waggoner, the Respondent, for driving under the influence of alcohol. At the scene, Waggoner was administered field sobriety tests and waived his Miranda rights.

The police took Waggoner to a hospital, where he refused to submit to a blood test, and then transported him to the township's police station. At the station he was once again subjected to the field sobriety tests, which procedure was videotaped. For discussion, the tape can conveniently be divided into three parts: 1) the reiteration of the Miranda warnings; 2) the performance of the sobriety tests; and 3) Waggoner's interrogation concerning the offense.

During the administration of the Miranda warnings, Waggoner told the officer that he could not afford an attorney; however, the officer proceeded to complete the warnings without attempting to clarify this response. During the second portion of the tape, Waggoner engaged in conversation with the officer, revealing his thoughts concerning his performance of the tests. During the third portion, Waggoner responded to the officer's questions concerning the details of the offense.

On January 21, 1987, Waggoner was tried by a jury and found guilty of driving under the influence of alcohol. The trial judge refused to suppress the videotape, which was viewed by the jury.

On appeal, the Superior Court of Pennsylvania awarded a new trial, holding that the audio portion of the videotape should have been suppressed. The Superior Court found that Waggoner's Fifth and Sixth Amendment rights had been violated in that: the prosecution had not established a waiver of his Miranda rights; his right to counsel had attached at arrest; and the videotaping was a critical stage at which he had a right to counsel and the right not to incriminate himself.

The Supreme Court of Pennsylvania refused the Petitioner's request for review of the Superior Court's decision, and Petitioner now asks this Court to grant its Petition for Writ of Certiorari.

## REASONS FOR DENYING THE WRIT

I. AS THE RESPONDENT WAS SUBJECTED TO CUSTODIAL INTERROGATION DURING THE ADMINISTRATION OF VIDEOTAPED SOBRIETY TESTS, THE AUDIO PORTION OF THE TAPE IS PROTECTED BY THE FIFTH AMENDMENT.

There is absolutely no question that a portion of the videotape at issue constituted custodial interrogation of the Respondent. Such is clear from the record and has been conceded by the Petitioner. Petition for Writ of Certiorari, p.9. Consequently, the police were required to administer the Miranda warnings at least with respect to this portion of the tape. Miranda v. Arizona, 384 U.S. 436 (1966).

As police questioning of an in-custody criminal defendant occurred, this case does not present the issue of whether recitation of the alphabet is testimonial, which was recognized but not reached in Pennsylvania v. Bruder, ___ U.S. ___, ___ n.3, 102 L.Ed.2d 172, 177 n.3 (1988). Nor does this case present the issue raised in South Dakota v. Neville, 459 U.S. 553 (1983)(concerning the distinction between real or physical evidence and communications or testimony).

As Respondent was subjected to custodial interrogation, unless he waived his Miranda rights, the audio recording relating to the portion of the tape should not have been admitted at his trial -- the conclusion reached by the Superior Court of Pennsylvania. Thus, irrespective of whether the other portions of the videotape constitute interrogation, Respondent is entitled to a new trial.

Considering that a significant part of the videotape unarguably constituted custodial interrogation, this Court need inquire no further as to whether the Fifth Amendment applies to the other portions of the tape. However, in response to Petitioner's assertions, Respondent will discuss these other portions: the administration of the Miranda warnings and the performance of the sobriety tests.

Respondent concedes that the videotaping of the administration of his Miranda warnings is non-testimonial. (However, as these warnings flow from the Self-Incrimination Clause, it is paradoxical to conclude that the Fifth Amendment does not apply to them.)

The middle portion of the videotape depicting the administration of the sobriety tests poses a more difficult Fifth Amendment issue. This portion of the tape reveals far more than Respondent's physical performance of the sobriety tests. Clearly, he uttered words of significant testimonial value. During the administration of the tests, the police officer engaged in constant conversation with the Respondent. In several instances,

the Respondent's words could easily constitute evidence to be used against him. For example, during the testing, Respondent made the following comments: "Is this put on tape?" "It makes you kind of dizzy." "How did I do?" "This is rough." "Hmm. Screwed up." Any competent prosecutor would seek to introduce words like these into evidence to show that a defendant had guilty knowledge or was manifesting symptoms of being under the influence of alcohol.

As stated in Doe v. United States, 487 U.S. ___, 101 L.Ed.2d 184 (1988), the policies underlying the Self-Incrimination Clause "are served when the privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government." Id. at ___, 101 L.Ed.2d at 199. During the administration of the sobriety tests, Respondent certainly shared his thoughts and beliefs with the police. He expressed his frustration with the difficulty with the tasks, his doubts concerning his performance, his admitted failure in "walking the line," and offered an explanation for his problem (arthritis in his right hip and knee).

In conclusion, Respondent does not assert that the Self-Incrimination Clause pertains to all videotapings of sobriety tests. Indeed, a procedure which did not prompt a defendant to share his inner thoughts may pass Constitutional

muster. But such is clearly not this case. The audio recording pertinent to the middle portion of the videotape revealed the Respondent sharing his thoughts and beliefs with the police; accordingly, he was entitled to the protection of the Fifth Amendment.

II. IN ACCORDANCE WITH CONSTITUTIONAL PRINCIPLES, PENNSYLVANIA LAW PROVIDES THAT THE RIGHT TO COUNSEL ATTACHES AT ARREST; MOREOVER, EVEN IF VIEWED AS AFFORDING A MORE EXPANSIVE RIGHT TO COUNSEL THAN PROVIDED BY THE SIXTH AMENDMENT, THE SUPERIOR COURT'S DECISION WAS BASED ON AN INDEPENDENT AND ADEQUATE NON-FEDERAL GROUND.

A criminal defendant's Sixth Amendment right to counsel attaches at "the initiation of adversary judicial proceedings." United States v. Gouveia, 467 U.S. 180, 188 (1984)(citing with approval Kirby v. Illinios, 406 U.S. 682 (1972) and collecting cases).

As a matter of state law, the Supreme Court of Pennsylvania has specifically held that a warrantless arrest (as occurred in this case) constituted the initiation of adversarial judicial proceedings. Commonwealth v. Richmond, 458 Pa. 167, 320 A.2d 351 (1974). The Richmond decision recognized that the various state procedures may vary as to the initiation of criminal proceedings:

> Kirby does not establish an all inclusive rule; rather, the line to be drawn depends upon the procedure employed by each state.
>
> * * *
>
> While the plurality in Kirby attaches some significance to the indictment, they specifically mention several benchmarks: "formal charge, preliminary hearing, indictment, information, or arraignment."
>
> * * *
>
> ...we hold that Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970) appropriately draws the line for determining the initiation

> of judicial proceedings in Pennsylvania at the arrest.

Id. at ___, 320 A.2d at 353. See also Commonwealth v. Zabala, 310 Pa.Super. 301, 456 A.2d 622, 628 (1983)(collecting cases).

The rulings by the Supreme and Superior Courts of Pennsylvania that the right to counsel attaches at arrest are unremarkable in that the Pennsylvania Rules of Criminal Procedure, as promulgated by the Supreme Court, specifically provide for the institution of criminal cases:

> Criminal proceedings in court cases shall be instituted by:
>
> * * *
>
> 2. an arrest without warrant when the offense is a felony or misdemeanor committed in the presence of the police officer making the arrest;
>
> * * *

Pennsylvania Rule of Criminal Procedure No. 101.

Unsurprisingly, the Superior Court held that the Respondent's right to counsel attached at his arrest. Commonwealth v. Waggoner, 373 Pa.Super. 23, 540 A.2d 280 (1988). While explicitly basing its decision on the Sixth Amendment, the Court cited Zabala, supra (which stated that "Pennsylvania courts have long held that an accused's right to counsel is triggered by the accused's arrest") and included Richmond, supra, as one of its citations.

Even if this Court finds that the Superior Court's decision was based upon the Sixth Amendment, there is an adequate and independent ground for its decision based on the Pennsylvania Constitution. As stated by the Superior Court in Commonwealth v. Ferguson, 327 Pa.Super. 305, 475 A.2d 810, 813 (1984), "the rule expressed in Whiting [that the right to counsel attaches at arrest] remains the law of Pennsylvania by virtue of Article I §9 of the Pennsylvania Constitution which provides, in relevant part, that 'In all criminal prosecutions the accused hath a right to be heard by himself and his counsel.'"

As this non-federal ground independently and adequately supports the Superior Court's judgment, this Court does not have jurisdiction to decide this issue.

III. BECAUSE THE VIDEOTAPING OF THE RESPONDENT UNQUESTIONABLY INVOLVED CUSTODIAL INTERROGATION BY THE POLICE, SUCH WAS A CRITICAL STAGE AND HE WAS ENTITLED TO THE ASSISTANCE OF COUNSEL.

The Petitioner has agreed that a portion of the videotaped interview constitutes custodial interrogation. Petition for Writ of Certiorari, p.9. It is beyond cavil that a defendant in custody of the police has a right to counsel while being interrogated. Edwards v. Arizona, 451 U.S. 477 (1981). Thus, this portion of the videotape was certainly a critical stage at which Respondent had the right to counsel.

Unless this Court finds that the Respondent has waived this right, further inquiry is not necessary. Respondent was in custody, was interrogated, was not afforded counsel, and his videotaped statements -- which should have been suppressed -- were used against him at his trial. Consequently, the Superior Court was correct in awarding him a new trial.

It is simply not necessary for this Court to consider whether the "testing" portion of the videotaping was a critical stage. However, in response to Petitioner's assertions, the Respondent calls attention to the testimonial nature of such testing as described in the discussion of the Self-Incrimination Clause, supra, and the portion of the Superior Court's opinion concerning the Sixth Amendment in Waggoner, supra.

Indeed, the Superior Court noted the value of counsel at such procedure:

> Waggoner's counsel, if present during the videotaping, may have been able to prevent at least some of the prejudice which inured to Waggoner as a result of the questions, comments, and statements he made during the taping. His counsel could have prevented him from incriminating himself by advising him to speak as little as possible during the test and directing him not to answer certain or all of the questions posed by Officer Neri.

Id. at ___, 540 A.2d at 285.

IV. RESPONDENT DID NOT WAIVE HIS MIRANDA RIGHTS OR HIS RIGHT TO COUNSEL.

At the outset of the videotaping, Respondent was re-advised of his Miranda rights. When the police officer asked him whether he understood his right to a free lawyer, he said, "I can't afford a lawyer." Rather than attempt to clarify this ambiguous response, the officer blithely proceeded as follows:

> OFFICER NERI: Understanding these rights and having them in mind, do you wish to give up these rights and talk to me now?
>
> THE DEFENDANT: About what?
>
> OFFICER NERI: Well there will be some questions I have here. If you wish to answer them you may, and if you don't you can just refuse to answer them and that's perfectly all right.
>
> THE DEFENDANT: Well, ask them.
>
> OFFICER NERI: Okay.
>
> THE DEFENDANT: Now, I may answer them; I may not.
>
> OFFICER NERI: That's fine.
>
> THE DEFENDANT: It depends. As I said, it depends on what the question is. Okay.
>
> OFFICER NERI: That's okay.
>
> THE DEFENDANT: All right.

Respondent asserts that his ambiguous response to the Miranda warnings did not constitute a waiver of his rights and relies on the following portion of Superior Court's opinion:

"Waggoner contends that his comment "I can't afford a lawyer" constituted an invocation of his right to counsel which barred any further custodial interrogation by the police. Moreover, Waggoner asserts that his response, "I may answer them, I may not. It depends on what the question is," to Neri's inquiry about whether he would respond to questions, was clearly the response of a wary man. Therefore, Waggoner argues, the Commonwealth should have shouldered the burden of establishing an explicit waiver of his right to counsel.

"Initially, we note that had Waggoner not been rewarned of his Miranda rights at the beginning of the videotaping, we would be required to examine the totality of the circumstances to determine whether he should have been rewarned. Commonwealth v. Riggins, 451 Pa. 519, 304 A.2d 473 (1973). If our examination then revealed that his first warning was sufficient, our holding then would be that Waggoner voluntarily, knowingly, and intelligently waived his Miranda rights. However, the fact remains that Waggoner was given a second Miranda warning and during this second warning he voiced an ambiguous statement regarding his understanding of his right to counsel.

"In Edwards v. Arizona, 451 U.S. 477 (1981)(per curiam), the Supreme Court held that an accused who has expressed his desire to deal with the police only through counsel may not be subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication, exchanges, or conversations with the police. In Smith v. Illinois, 469 U.S. 91 (1984), the following exchange took place between a police officer and the appellant: "Q. You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that? A. Uh, yeah. I'd

like to do that." Id. at 93. The Supreme Court held that this was an unambiguous invocation of the appellant's right to counsel. In so holding, the Court noted that courts have developed conflicting standards for determining the consequences of an ambiguous or equivocal assertion of the right to counsel:

> Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. Others have attempted to define a threshold clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. See, e.g., People v. Krueger, 82 Ill. 2d 305, 311, 412 N.E.2d 537, 540 (1980) ("[A]n assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity," but not " every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute and invocation of the right to counsel"), cert. denied, 451 U.S. 1019, 101 S.Ct. 3009, 69 L.Ed.2d 390 (1981). Still others have adopted a third approach, holding that when an accused makes an equivocal statement that "arguably" can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel.

469 U.S. at 96 n.3. However, because Smith's request for counsel was unambiguous under any of the various standards, the Supreme Court did not have to resolve the conflict between the courts. Id. at 93.

"In Commonwealth v. Hubble, 509 Pa. 497, 504 A.2d 168 (plurality opinion), cert. denied, 106 S.Ct. 3272 (1986), the Supreme Court of Pennsylvania considered the Smith alternatives. The court reasoned that the first approach, in which all questioning must cease upon any mention of counsel no matter how ambiguous or equivocal, is unduly restrictive. The court then proceeded to apply the other two standards, concluding that under either of them, Hubble's ambiguous request for counsel did not trigger the Edwards prophylactic rule. Id.

"In Commonwealth v. Davis, ___ Pa.Super. ___, 526 A.2d 1206 (1987), the appellant was given his Miranda warnings and gave every indication of fully understanding them. Then:

> [Appellant] said to the police that he wanted to talk about and make a statement regarding the crimes under investigation. Having said this, he was given a form on which were enumerated his rights under Miranda. Two questions to be answered at the bottom of the form contained a waiver proviso. To the first question, "Do you understand each of these rights I have explained to you," [appellant] answered by writing the word, "yes" and his initials thereafter. To the second question, "Having these rights in mind do you wish to talk to us now?", [appellant] wrote "no". At trial the police officers testified that they were baffled by the written "no" answer in light of [appellant's] oral statement immediately prior thereto that he wanted to make a statement regarding the crimes under investigation. As a result, they asked why he wrote "no" to the second question and [appellant] answered that he meant, "I don't want an attorney." After this exchange, the [appellant] wrote the word

> "yes" to this second question and his initials thereafter in substitution of the word "no". [Appellant] then made his oral statement regarding the crimes involved in this case which the officers reduced to writing. The [appellant] signed the statement and initialed its pages.

Id. at ___, 526 A.2d 1208. The Davis court held that the questions by the police in their attempt to clarify the appellant's intent in making the two conflicting statements were appropriate and commendable. The court reasoned that by attempting to clarify the ambiguity in the appellant's responses without employing any coercive tactics, the police gave the appellant a "free and untrammeled choice of silence or speech." Id. at ___, 526 A.2d at 1211.

"When Waggoner was given his Miranda warnings during the videotaping, he stated that he could not afford a lawyer. This statement constituted an ambiguous assertion of his right to counsel. The statement was directly at odds with Officer Neri's explanation to Waggoner that it he could not afford a lawyer, he could have one appointed for him free of charge. Considering Waggoner's response, one could easily draw the conclusion that Waggoner had failed to understand that he could have a free lawyer appointed for him. Moreover, Waggoner's statement would seem to indicate that if he could have afforded a lawyer, he would have wanted one present. Waggoner's ambiguous response prevents one from stating with unswerving confidence that he fully understood he had the right to have a lawyer appointed for him at no cost and that he waived that right.

"Officer Neri responded to Waggoner's inconsistent reply by continuing with the Miranda colloquy. Unlike the officers in Davis, Officer Neri never attempted to clarify whether Waggoner had understood his right to have counsel free of charge. The fact that Waggoner ultimately decided that he might answer Neri's questions depending on what the question was did not obviate the need to

> establish that he had understood and waived his right to counsel. In cases such as this, when a defendant's statement regarding his Miranda rights is ambiguous and inconsistent with an officer's explanation of those rights, the officer should ask questions to clarify what the defendant meant by his statement or why he made it. Simply ignoring the fact that the statement was made will not suffice. A defendant's waiver of his Miranda rights is valid only if made voluntarily, knowingly, and intelligently. Miranda v. Arizona, supra. In light of the ambiguity in the appellant's statement, we cannot state with a sufficient degree ~~of~~ certainty that he understood and waived his Miranda rights. The burden of proving by a preponderance of evidence that a waiver of a constitutional right was knowing, voluntary, and intelligent rests upon the Commonwealth. Commonwealth v. Hughes, 477 Pa. 180, 186, 383 A.2d 882, 885 (1978). Based on the foregoing, we cannot find that the Commonwealth met this burden. The audio portion of the videotape, therefore, should have been suppressed.
>
> "In summary, the visual portion of the videotape wherein Waggoner performed the physical acts of the field sobriety test was properly admitted into evidence. However, the audio portion of the videotape violated Waggoner's right to counsel as provided by the fifth and sixth amendments and, consequently, should have been suppressed."

Waggoner, supra, 373 Pa.Super. at ___, 540 A.2d at 287-89.

V. THERE IS NO NEED FOR A VIDEOTAPE EXCEPTION TO MIRANDA V. ARIZONA OR EDWARDS V. ARIZONA.

Since 1966, Miranda v. Arizona, supra, has served to protect criminal defendants' rights against self-incrimination. Of more recent vintage, Edwards v. Arizona, supra, has protected defendants asserted their right to counsel. The creation of a videotape exception to either case would open a Pandora's Box of woes upon judges, lawyers, and law enforcement officers --all of whom would be compelled to contend with the depth and breadth of this new legal concept.

## CONCLUSION

For the above reasons, the Respondent, Richard Waggoner, respectfully requests this Honorable Court to deny certiorari in this matter.

Respectfully submitted,

John R. Merrick

John R. Merrick, Esquire
Public Defender of Chester County
Counsel for Respondent

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA, :
Petitioner

v. : NO. 88-1065

RICHARD WAGGONER, :
Respondent

PROOF OF SERVICE

I hereby certify that I am on this day serving a copy of this document upon the person and in the manner indicated below, which satisfies the requirements of Rule 28.3:

Service in Person

Stuart Suss, Esquire
Deputy District Attorney
District Attorney's Office
17 North Church Street
Courthouse Annex - Second Floor
West Chester, PA 19380

All parties required to be served have been served.

Date: March 27, 1989

John R. Merrick

John R. Merrick, Esquire
Public Defender of Chester
County, Pennsylvania
17 North Church Street
Courthouse Annex - Third Floor
West Chester, PA 19380

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA, :
Petitioner

v. : NO. 88-1065

RICHARD WAGGONER, :
Respondent

I, John R. Merrick, being a member of the Bar of the Supreme Court of the United States, state that the respondent's Brief in Opposition to Petition for Writ of Certiorari in the above-captioned case was deposited in the United States Post Office on Walnut and Gay Streets, West Chester, Pennsylvania, on March 27, 1989, within the permitted time for filing.

John R. Merrick

John R. Merrick, Esquire
Public Defender of Chester
County, Pennsylvania
17 North Church Street
Courthouse Annex - Third Floor
West Chester, PA 19380

Subscribed and Sworn to Before
me this 27th day of March, 1989.

Catherine E. Pierce

NOTARIAL SEAL
Catherine E. Pierce, Notary Public
West Chester, Chester County
My Commission Expires July 8, 1991